

2147

Oppe & Wilson

22 March/70

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2886 F

OF

THE STATE OF MISSOURI.

BY TRUMAN A. POST,

REPORTER.

VOL. XLIV.

ST. LOUIS:

M'KEE, FISHBACK AND COMPANY, PUBLISHERS.

1870.

UNIV. OF MICH. LAW LIBRARY.

Missouri

Entered according to act of Congress, in the year 1870, by

M'KEE, FISHBACK & CO.,

In the Clerk's office of the United States District Court for the Eastern District of
Missouri.

Stereotyped by STRASSBURGER & DRACH,
St. Louis, Mo.

HON. DAVID WAGNER,
HON. PHILEMON BLISS,
HON. WARREN CURRIER, } *Judges.*
O. T. FISHBACK, *Clerk at St. Louis.*
N. C. BURCH, *Clerk at Jefferson City.*
WILLIAM M. ALBIN, *Clerk at St. Joseph.*
TRUMAN A. POST *Reporter.*

The following order was adopted by the court at the January Term, 1870, at Jefferson City:

SUPREME COURT OF MISSOURI, }
JANUARY TERM, 1870. }

It is hereby ordered that in all cases coming by appeal or writ of error from the District Courts to this court, the clerks of the District Courts shall send up the original record, certified by the clerk of the Circuit Court, together with a certified copy of the opinion delivered in the District Court, which, under the statute, is all the record authorized to be transmitted to this court.

And it is further ordered that the clerk of this court make out a certified copy hereof, without delay, and transmit the same to the clerks of the several District Courts in this State.

LIST OF CASES REPORTED.

A

	PAGE
Abbott v. Shepard.....	273
Adams, State ex rel. Pittman v.....	570
Albin, State ex rel. Ensworth v.....	346
Alexander, Arnot v.....	25
Allen v. Ranson.....	263
Andrew County, Terrell v.....	309
Arnot v. Alexander.....	25
Ashbaugh, Adm'r of McCormick, McCrary v.....	410
Attorney-General, State ex rel. v. Bishop.....	229
Attorney-General, State ex. rel. v. Davis.....	129
Attorney-General, State ex rel. v. Pearey.....	159
Attorney-General, State ex rel. v. Steers.....	223
Aubuchon v. Bender.....	560

B

Bank of Commerce v. Bogy.....	13
Bank of the State of Missouri, Furnold v.....	336
Bank of the State of Missouri v. Tutt.....	366
Barrett v. County Court of Schuyler County.....	197
Bartling v. Jamison.....	141
Bean, Corby v.....	379
Beard v. Parks.....	244
Bell, Kerr v.....	120
Bender, Aubuchon v.....	560
Bernecker v. Miller & Koehler.....	126
Bernecker v. Miller & Miller.....	102
Berrell v. Davis.....	407
Bishop, State ex rel. Attorney-General v.....	229
Blackman v. Welsh.....	41
Blenkeship, State ex rel., v. County Court of Texas County.....	230
Block's Ex'r v. Garnhart.....	202
Bogy, Bank of Commerce v.....	13
Boon, State, to use of Watts, v.....	254
Bornefeld, State ex rel. v. Kupferle.....	154
Bowen v. Lazalere.....	383
Bowen, Shores v.....	396
Branch, Koch v.....	542
Brown, Waters v.....	302

	PAGE
Brunswick, City of, Chillicothe and Brunswick Railroad Company v.....	553
Bryson v. Bryson.....	232
Buchanan County, Watson v.....	422
Buckner, City of St. Louis, to use of Murphy, v.....	19

C

Caldwell v. Layton.....	220
Calhoun, Matson v.....	368
Campbell v. Johnson.....	247
Carr v. Waldron.....	393
Carter, English's Adm'r v.....	195
Carter, Adm'r of English, v. Carter.....	195
Cheltenham Fire Brick Company v. Cook.....	29
Chillicothe and Brunswick Railroad Company v. City of Brunswick.....	553
Clemens, Lind v.....	540
Cook, Cheltenham Fire Brick Company v.....	29
Corby v. Bean.....	379
County Court of Clark County, Spangler v.....	207
County Court of Schuyler County, Barrett v.....	197
County Court of Linn County, State ex rel. N. M. Cent. Railroad Co. v....	504
County Court of Texas County, State ex rel. Blenkinship v.....	230
Currie, First National Bank of Warsaw v.....	91

D

Dallmeyer, Hickey, Adm'r of Holland, v.....	237
Davis, Berrell v.....	407
Davis, State ex rel. Brown v.....	129
De Kalb County v. Hixon.....	341
De Noue, City of St. Louis, to use of Rotchford, v.....	136
Dinning, Vail v.....	210
Donaldson, ex parte.....	149
Donegan, McDermott v.....	85
Dover v. Kennerly.....	145
Draper, State ex rel. Koch v.....	278
Draper, State ex rel. State Savings Association v.....	245
Dunklin, Foster v.....	216

E

Easley, Merchants' Bank of St. Louis v.....	286
English's Adm'r v. Carter.....	195
English, Quinlivan v.....	46
Ensworth, State ex rel. v. Albin.....	346
Ewing v. Ewing.....	23

F

Fassett, Filley v.....	168
Field, Turner v.....	382

LIST OF CASES REPORTED.

vii

	PAGE
Filley v. Fassett.....	168
First National Bank of Hannibal v. Meredith.....	500
First National Bank of Warsaw v. Currie.....	91
Fish v. Lightner.....	268
Fisher v. City of St. Louis.....	482
Fitzgerald, State ex rel. Turner v.....	425
Flynn, Rannells v.....	604
Foster v. Dunklin.....	216
Frank, State ex rel., v. Smith.....	112
Fremon, Merry v.....	513
Fugitt v. Nixon.....	205
Furnold v. Bank of the State of Missouri.....	336

G

Garnhart, Parker, Ex'r of Block, v.....	202
Garvin's Adm'r v. Williams.....	465
Gillahan v. Wren.....	377
Goerges v. Hufschmidt.....	179
Griffin v. Pugh.....	326
Grumley v. Webb.....	444
Guion, Holmes v.....	164

H

Hannibal and St. Joseph Railroad Company, Lafferty v.....	291
Hannibal and St. Joseph Railroad Company, Parker v.....	415
Hannibal and St. Joseph Railroad Company, Ruby v.....	443
Harper v. Indianapolis and St. Louis Railroad Company.....	488
Hartzell, Huxley v.....	370
Haywood v. Russell.....	252
Heed, State, to use of, v. King.....	238
Hemery, Moore's Adm'r v.....	350
Herriford, Lesem v.....	323
Hickey, Adm'r of Holland, v. Dallmeyer.....	237
Hixon, De Kalb County v.....	341
Hoffner, Kronenberger v.....	185
Holland's Adm'r v. Dallmeyer.....	237
Holmes v. Guion.....	164
Holton, Mortland v.....	58
How, Rebetto v.....	52
Hufschmidt, Goerges v.....	179
Hug, State ex rel. Rogers v.....	116
Huxley v. Hartzell.....	370

I

Indianapolis and St. Louis Railroad Company, Harper v.....	488
--	-----

J

Jamison, Bartling v.....	141
--------------------------	-----

	PAGE
Jarrett v. Morton.....	275
Jennings v. Brizeadine.....	332
Joeckel, State v.....	234
Johnson, Campbell v.....	247

K

Kennerly, Dover v.....	145
Kercheval v. King.....	401
Kerr v. Bell.....	120
Kerr, Turner v.....	429
King, Kercheval v.....	401
King, State ex rel. Missouri Mutual Life Insurance Company v.....	283
King, State, to use of Heed, v.....	288
Kinner v. Walsh.....	65
Kloss, May v.....	300
Koch v. Branch.....	542
Koch, State ex rel., v. Draper.....	278
Kronenberger v. Hoffner.....	185
Kupferle, State ex rel. Bornefeld v.....	154

L

Laclede Mutual Fire and Marine Insurance Company, Zallee v.....	530
Lafferty v. Hannibal and St. Joseph Railroad Company.....	291
Layton, Caldwell v.....	220
Lazalere, Bowen v.....	383
Lesem v. Herriford.....	323
Lightner, Fish v.....	268
Linn County Court, State ex rel., North Missouri Central Railroad Co. v..	504
Lind v. Clemens.....	540
Little v. Page.....	412
Loker, Waddingham's Ex'rs v.....	132
Lowell, Meyer v.....	328

Mc.

McCollum, State v.....	343
McCormick's Adm'r, McCrary v.....	410
McCrary v. Ashbaugh, Adm'r of McCormick.....	410
McDermott v. Donegan.....	85
McGlothlin, Adm'r of Moore, v. Hemery.....	350

M

Magwire v. Riffin.....	512
Mathews, State v.....	523
Matson v. Calhoun.....	368
Matson, Adm'r, State ex rel. Midgett v.....	305
Meagher, State ex rel. Townshend, Adm'r, v.....	356
Mechanics' Bank v. Pitt.....	364

LIST OF CASES REPORTED.

ix

	PAGE
Megoun, Pike v.....	491
Merchants' Bank of St. Louis v. Easley.....	286
Meredith, First National Bank of Hannibal v.....	500
Merry v. Fremon.....	518
Meyers, ex parte.....	279
Meyer v. Lowell.....	328
Midgett, State ex rel. v. Matson.....	305
Miller and Koehler, Bernecker v.....	126
Miller and Miller, Bernecker v.....	102
Minke v. Skinner.....	92
Minor, State ex rel. Winburn v.....	393
Missouri Mutual Life Insurance Company, State ex rel. v. King.....	283
Moore's Adm'r v. Hemery.....	350
Mortland v. Holton.....	58
Morton, Jarrett v.....	275
Murphy v. Wilson.....	313
Murphy, City of St. Louis to use of, v. Buckner	19
Murtaugh v. City of St. Louis.....	479

N

Nelson v. Brodhack.....	596
Nixon, Fugitt v.....	295
North Missouri Central Railroad Co., State ex rel. v. Linn County Court..	504

O

Owens v. Rector.....	389
Ownby, Reed v.....	204

P

Page, Little v.....	412
Parker, Ex'r of Block, v. Garnhart.....	202
Parker v. Hannibal and St. Joseph Railroad Company.....	415
Parks, Beard v.....	244
Pearcy, State ex rel. Attorney-General v.....	159
Pike v. Megoun.....	491
Pitt, Mechanics' Bank v.....	364
Pittman, State ex rel., v. Adams.....	570
Powell, State ex rel. Rice v.....	436
Pugh, Griffin v.....	326

Q

Quinlivan v. English.....	46
---------------------------	----

R

Rannells v. Flynn.....	604
Ranson, Allen v.....	263
Reagan, State to use of, v. Romer.....	99

	PAGE
Rebetto v. How.....	52
Rector, Owens v.....	389
Reed v. Ownby.....	204
Renick, Salisbury v.....	554
Rice, State ex rel., v. Powell.....	436
Richardson v. Vrooman.....	440
Riggin, Magwire v.....	512
Rogers, State ex rel., v. Hug.....	116
Rombauer, State ex rel. Nicholson v.....	590
Romer, State, to use of Reagan, v.....	99
Rose v. Spies.....	20
Rotchford, City of St. Louis, to use of, v. De Noue.....	136
Ruby v. Hannibal and St. Joseph Railroad Company.....	443
Russell, Haywood v.....	252

S

St. Louis, City of, Fisher v.....	482
St. Louis, City of, v. Weber.....	547
St. Louis, City of, Murtaugh v.....	479
St. Louis, City of, Uhrig v.....	458
St. Louis, City of, to use of Murphy, v. Buckner.....	19
St. Louis, City of, to use of Rotchford, v. De Noue.....	136
Salisbury v. Renick.....	554
Shepard, Abbott v.....	273
Shores v. Bowen.....	396
Skinner, Minke v.....	92
Smith, State ex rel. Frank v.....	112
Southwestern Freight and Cotton Press Company v. Stanard.....	71
Spangler v. County Court of Clark County.....	207
Spies, Rose v.....	20
Stanard, Southwestern Freight and Cotton Press Company v.....	71
State v. Joeckel.....	234
State v. McCollum.....	343
State v. Mathews.....	523
State ex rel. Attorney-General v. Bishop.....	229
State ex rel. Attorney-General v. Davis.....	129
State ex rel. Attorney-General v. Pearcy.....	159
State ex rel. Attorney-General v. Steers.....	233
State ex rel. Blenkinship v. County Court of Texas County.....	230
State ex rel. Bornefeld v. Kupferle.....	154
State ex rel. Ensworth v. Albin.....	346
State ex rel. Frank v. Smith.....	112
State ex rel. Koch v. Draper.....	278
State ex rel. Midgett v. Matson.....	305
State ex rel. Missouri Mutual Life Insurance Company v. King.....	283
State ex rel. Nicholson v. Rombauer.....	590
State ex rel. North Missouri Central Railroad Co. v. Linn County Court...	504
State ex rel. Pittman v. Adams.....	570
State ex rel. Rice v. Powell.....	436

LIST OF CASES REPORTED.

xi

	PAGE
State ex rel. Rogers v. Hug.....	116
State ex rel. State Savings Association v. Draper.....	243
State ex rel. Townshend, Adm'r, v. Meagher.....	356
State ex rel. Turner v. Fitzgerald.....	425
State ex rel. Winburn v. Minor.....	373
State, to use of Heed, v. King.....	238
State, to use of Reagan, v. Romer.....	99
State, to use of Watts, v. Boon.....	254
State Bank of Missouri v. Tutt.....	366
State Savings Association, State ex rel., v. Draper.....	245
Steers, State ex rel. Attorney-General v.....	223

T

Terrell v. Andrew County.....	306
Townshend, Adm'r, State ex rel., v. Meagher.....	356
Truman, In re.....	181
Turner v. Field.....	382
Turner v. Kerr.....	429
Turner v. Turner.....	535
Turner, State ex rel., v. Fitzgerald.....	425
Tutt, State Bank of Missouri v.....	366

U

Uhrig v. The City of St. Louis.....	458
-------------------------------------	-----

V

Vail v. Dinning.....	210
Vrooman, Richardson v.....	440

W

Waddingham's Ex'r v. Loker.....	132
Waldron, Carr v.....	395
Walsh, Kinner v.....	65
Waters v. Brown.....	302
Watson v. Buchanan County.....	422
Watts, State to use of, v. Boon.....	254
Webb, Grumley v.....	444
Weber, City of St. Louis, v.....	547
Wellman v. Wickerman.....	484
Welsh, Blackman v.....	41
Wickerman, Wellman v.....	484
Williams, Garvin's Adm'r v.....	465
Wilson, Murphy v.....	313
Winburn, State ex rel., v. Minor.....	398
Wren, Gillahan v.....	377

Z

Zallee v. Laclede Mutual Fire and Marine Insurance Company.....	530
---	-----

LIST OF CASES CITED FROM MISSOURI REPORTS.

A

	PAGE
Alexander v. Warrance.....	539
Austin v. Freeland.....	62

B

Bank of Missouri v. Benoist et al.....	331
Bass v. Walsh.....	83
Bateson v. Clark.....	64
Bauer v. Wagner.....	601
Beal v. Harmer.....	266
Bernard v. Callaway County Court.....	219
Bernecker v. Miller.....	107, 127
Berthold v. Reyburn.....	406
Biddle v. Mellon.....	601
Blackmore v. Boardman.....	23
Blair v. Perpetual Insurance Company.....	262
Blair v. Smith.....	601
Boardman v. Florez.....	451
Boatman v. Curry.....	379
Brison v. Lingo.....	157
Bruce v. Vogel.....	420
Bryan v. Wear.....	266
Bryson v. Bryson.....	233
Bryson v. Campbell.....	233
Bush v. Deipenbrock.....	301

C

Chouteau v. Goddin.....	251, 370
Christy's Adm'r v. City of St. Louis.....	440
City and County of St. Louis v. Alexander.....	464, 511
City of St. Louis v. Lind.....	218, 541
City of St. Louis v. Teifel.....	526
City of St. Louis to use, etc., v. Clemens.....	19
City of St. Joseph v. Hamilton.....	120
Clafin v. Rosenberg.....	324
County of Lewis v. Tate.....	440
Cunningham v. Ashbrook.....	83
Curry v. Lackey.....	534

LIST OF CASES CITED FROM MISSOURI REPORTS. xiii

D

	PAGE
Davis v. Francisco.....	297
Davis v. Ownby.....	206, 565
Dickman v. Desire's Adm'r.....	514
Dobyns v. McGovern.....	259
Dodd v. Winn.....	309
Douglass v. Stenhens.....	303
Drehman v. Stifel.....	486

E

Evans v. Green.....	194
---------------------	-----

F

Finney v. Cist.....	28
Flagg v. Palmyra.....	202
Ford v. Angelrodt.....	17
Foster v. State.....	213
Freeland v. Eldridge.....	538
Fuhr v. Dean.....	370

G

Garnhart v. Finney.....	28
Garred v. Doniphan.....	534
Garrett v. City of St. Louis.....	463
Garrison v. Savignac.....	180
Gentry v. Fry.....	233
George v. Williamson.....	522
Gibson v. Bogy.....	194
Gorman v. Pacific Railroad.....	529
Graham v. City of Carondelet.....	166, 167

H

Hannibal and St. Joseph Railroad v. Marion County.....	202
Hardy v. Matthews.....	250, 334
Hart v. Rector.....	603
Henly v. Arbuckle.....	592
Heltzell v. Hynes.....	140
Hening v. Powell.....	83
Hequembourg v. Lawrence.....	157
Holmes v. Carondelet.....	167

J

Jackson v. St. Louis.....	549, 551, 553
Jacques v. Edgell.....	451
Jamison v. Glasscock.....	451

xiv LIST OF CASES CITED FROM MISSOURI REPORTS.

	PAGE
Jones v. Louderman.....	405
Joyce v. Moore.....	379

K

Kent v. Rodgers & Dillon.....	62
Kimball v. Donald.....	17
Kronenberger v. Hoffner.....	603

L

Ladd v. Couzins.....	342
Lane v. Charless.....	214
Latimer v. Union Pacific Railway Company.....	275
Lionberger v. Rowse.....	503
Linville v. Welsh.....	298, 556
Little v. Page.....	327
Lockwood v. City of St. Louis.....	463
Lord v. Wilson.....	601

M

McCamant v. Patterson.....	565
McCune v. Belt.....	339
McElhany v. Stewart.....	157
McLaughlin v. McLaughlin.....	522
McNew v. Booth.....	452
Manny v. Fraizer.....	331
Mattison v. State.....	183
Mayo v. Freeland.....	228
Miles v. Davis.....	41
Miller v. Woodward.....	339

N

Newby v. Platte County.....	463
Newman v. Hood.....	251

O

O'Donohue v. Corby.....	372
Overbeck v. Gallaway.....	219

P

Page v. Becker.....	331
Parker v. Hannibal and St. Joseph Railroad.....	443
Parker v. Waugh.....	420
Parmelee v. Catherwood.....	327, 414
Pease v. Lawson.....	383
Price v. Woodford.....	24
Primm v. Carondelet.....	131
Primm et al. v. Walker.....	97

Q

	PAGE
Quinlivan v. English.....	49

R

Reardon v. St. Louis County.....	481
Reed v. Conway.....	497
Reed v. Wilson.....	265
Richardson v. Farmer.....	405
Risley v. City of St. Louis.....	468
Robbins v. Ayres.....	331
Rohback v. Pacific Railroad.....	294
Rosenheim v. American Insurance Company.....	242
Routon v. Lacy.....	309

S

Seeley v. Beck.....	339
Sigerson v. Kahman.....	84
Sloan v. Forse.....	253
Slowey v. McMurray.....	433
Smith v. McCutchen.....	274
State ex rel. v. Bernoudy.....	226
State ex rel. v. Fletcher.....	349
State ex rel. v. Macon County Court.....	512
State ex rel. v. McDonald.....	163
State ex rel. v. Straat.....	130
State to use, etc., v. Campbell.....	306
State v. Churchill.....	231
State v. Ebert.....	441
State v. Field.....	464
State v. Fulton.....	307
State v. Harrison.....	228
State v. McKay.....	451
State v. Moore.....	438
State v. Morton.....	307
State v. Ostrander.....	594
State v. Rodman.....	228
State v. Shacklett.....	438
State v. Shoenwald.....	236
State v. Starr.....	236
Stewart v. Stringer.....	342
Stone v. Graves.....	496
Sublett v. Noland.....	379

T

Taylor v. Zepp.....	251
Thomas v. Zumbalen.....	455
Thornton v. Irwin.....	267, 461

xvi LIST OF CASES CITED FROM MISSOURI REPORTS.

V

	PAGE
Valentine v. Havener.....	206
Vastine v. Dinan.....	307

W

Walkenhorst v. Coste et al.....	140
Waller v. Mardus.....	515
Walker v. City of St. Louis.....	440
Walker v. Mauro.....	18
Wellman v. Dismukes.....	124
West v. Best.....	265
Wilson v. Crocket.....	485
Wood v. Phelps County.....	259, 260

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

MARCH TERM, 1869, ST. LOUIS.

[CONTINUED FROM VOL. XLIII.]

THE BANK OF COMMERCE, Appellant, *v.* LOUIS V. BOGAY,
Respondent.

1. *Bill of exchange—Equity—Debt, assignment of—Evidence.*—A bill of exchange drawn by a creditor upon his debtor does not of itself operate as an assignment in equity of the debt, even where negotiated for a good consideration—although it is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawers, will vest in the holder an exclusive claim to the indebtedness.
2. *Bill of exchange—Equity—Debt, assignment of—Intention of parties.*—Anything that shows an intention on the one side to make a present irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration; and when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it—especially if advanced at the time, with no circumstances indicating any remaining interest in the drawer—the order should be treated as evidence of an equitable assignment.

2—VOL. XLIV.

Appeal from St. Louis Circuit Court.

The facts material to the case are set forth in the opinion of the court.

Garesche & Mead, for appellant.

I. The draft operated as an equitable assignment of the fund, because it was drawn against a particular fund, viz: assessments on capital stock. It directed payment of the fund to be made to plaintiff, and the payment was not dependent on any contingency. There was no reservation, on the part of the drawee, of any power or authority over the fund. It was drawn for all of the fund. In cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and, after notice to the drawee, it binds the fund in his hands. (*Mandeville v. Welch*, 5 Wheat. 289; *Blinn v. Pierce*, 20 Wend. 29; *Walker v. Mauro*, 18 Mo. 569; *Dana v. San Francisco*, 19 Cal. 490; *Wheatly v. Strobe*, 19 Cal. 92; *Edwards v. Daley*, 14 La. An. 384.) The distinction between those cases in which the transaction constitutes such an assignment and those in which it does not seems to depend upon the question whether the party having the control of the fund intended in fact to make an absolute appropriation of it, or whether he intended to retain the control of it. Where a debtor gives to his creditor an order upon one indebted to him, such order will be construed as an equitable assignment of the debt, even though the debtor on whom it is drawn had never assented thereto. (*Dickenson v. Phillips*, 1 Barb. 460; *Ford v. Angelrodt*, 37 Mo. 57; *Rodick v. Gandel*, 15 Eng. L. and Eq. 30.)

II. The petition alleges and the demurrer confesses that defendant promised to accept. This brings the case within *Gray v. Trafton*, 12 La. An. 702.

III. If the bill of exchange was simply as a letter of attorney from the Express Company to collect its dues, even then it was a power coupled with an interest; therefore irrevocable, and operates as an equitable assignment. (*Houghtaling, Adm'r, v. Marvin*, 7 Barb. 412.)

Ewing & Holliday, for respondent.

I. A bill of exchange not accepted does not operate as an assignment to the holder of the unaccepted bill of the indebtedness of the drawee to the drawer. (*Kimball v. Donald*, 20 Mo. 577; *Ford v. Angelrodt*, 37 Mo. 50; 1 Sandf. 416; 3 Sandf. 257; 3 Comst. 243; 1 Curtis, 133; 5 Hill, 413-417; 7 Hill, 577, 2 Am. Lead. Cas., ed. 1852, p. 141; 1 Seld. 525; 2 Seld. 412; 15 La. 255; 3 Kent's Com. 76; Sto. on Bills, §§ 46, 47.)

II. There is no allegation in the petition in this cause that any other contract was made than the law raises from the position in which the names of the parties appear to the bill. As to what this contract is, see 1 Pars. on Notes and Bills, p. 54, § 54.

III. There is no allegation that this draft was drawn on any particular fund. An order drawn on any particular fund has, after acceptance or promise of payment, been allowed to operate as an equitable assignment of the fund. But there was no particular fund in this case. The Express Company had no money in the hands of defendant Bogy. He may have been indebted to the Company for his subscription, but that is quite a different thing from having certain funds in his hands belonging to the drawer.

BLISS, Judge, delivered the opinion of the court.

The petition alleges that the plaintiff is a corporation organized under the laws of Maryland; the National Express and Transportation Company is a corporation of Virginia, to whose stock of \$100 a share the defendant subscribed for fifty shares, "and then and thereby obligated himself to pay said Express Company the sum of \$100 per share, or \$5,000 in all, at such times and in such sums as should be required and ordered by the legally constituted officers of the said Express Company, and to this end to accept of such drafts as should from time to time be drawn by said Express Company on defendant for the calls of stock which should be made, and until the sum of \$100 per share has been paid." The petition further alleges that the officers of the company, on the 26th of April, ordered that the shareholders, including

The Bank of Commerce v. Bogy.

defendant, should, on or before the 10th of May, 1866, pay five per cent. on each share; and on the 8th of August, 1866, made a further call of five per cent., payable the 25th, making in all \$500. On the 10th of August, 1866, the Express Company drew a bill upon defendant, at ten days' sight, for his indebtedness, and for a good consideration negotiated it to the plaintiff, "whereby plaintiff became subrogated in all the rights of the said Express Company, as the assignee of the said Express Company, of the indebtedness due to it" by the defendant. The petition alleges presentation of the draft, but acceptance was refused.

Defendant demurs to the petition: first, because of the joinder of different causes of action; and second, because the facts stated do not constitute a cause of action; alleging a want of allegation of facts sufficient to charge the defendant upon the bill, etc.

There is but one cause of action set out in the petition. The other allegations are intended only as averments necessary to establish a liability upon the bill. But the pleader has evidently drawn his petition upon the hypothesis that a bill upon a debtor for the exact amount of the debt is, *ipso facto*, by operation of law and without regard to the intention of the parties, an assignment of the debt to the person in whose favor the bill is drawn. The petition alleges the indebtedness by virtue of the subscription to the stock of the Express Company; the promise to accept drafts for the assessments as they should be made; the drawing and negotiation of the bill to the plaintiff for a good consideration, "whereby plaintiff became subrogated in all the rights of said Express Company, as the assignee," etc., "of the indebtedness due to it;" etc. There is no averment of any assignment to the plaintiff of defendant's indebtedness; no question of fact of intention in that regard is raised, but the legal effect of the bill is relied on. Neither does the pleader rely upon the previous general promise to accept such draft as should be drawn on him to cover the assessment; for that promise, even if it would be obligatory, is not alleged as made in fact, but is only charged as a legal inference from the subscription. "Plaintiff further avers that defendant subscribed to the capital stock," etc., "and then and thereby obligated himself," etc., "and to this end to accept,"

The Bank of Commerce v. Bogy.

etc.; *i. e.*, the legal effect of his subscription was an obligation to pay for the shares and to accept drafts for the calls of stock, and no express promise to accept the bill is alleged.

The pleader is mistaken in his view of the law. A bill drawn upon a debtor does not of itself operate as an assignment in equity of the debt, even if it is negotiated for a good consideration. It is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawer, will vest in the holder an exclusive claim to the indebtedness. The question of what constitutes an equitable assignment of a debt or a fund, in connection with an order or draft upon the debtor or holder of the fund, has often been before the courts of the country. There is some difference in the language used by different judges, arising more from the varying circumstances of the several cases than from conflict of opinion. I have found no case where a mere bill, though negotiated for a good consideration, is held of itself, without regard to the intention of the drawer, to operate as an assignment of the debt or fund, or so much thereof as is covered by the bill. Nor have I seen a case where the courts have refused to carry into effect the intention of the parties in relation to such debt or fund. In *Kimball v. Donald*, 20 Mo. 577, Judge Leonard clearly states the recognized doctrine: "Anything that shows an intention on the one side to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration." The court in that case denied that the bill then under consideration evidenced a transfer of the fund, without reference to the intentions of the drawers; and the case is followed in *Ford v. Angelrodt*, 37 Mo. 50. In both cases circumstances were held to indicate that it was not the intention of the drawer to make such a transfer. In *Dickenson v. Phillips*, 1 Barb. 454, the court, in holding that the transaction under consideration did not amount to an assignment, recognize the doctrine in saying that "no particular form of words is necessary to constitute an equitable assignment. But there must be evidence of intention to appropriate the fund."

The Bank of Commerce v. Bogy.

It has always been held that an order founded upon a good consideration, given for a specific debt or fund owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder, so that he may sue and recover the debt or fund whether the order be accepted or not. (*Walker v. Mauro*, 18 Mo. 564; *Blinn v. Pierce*, 20 Verm. 25; *Edwards v. Daley*, 14 La. An. 384; *Rodick v. Gandel*, 15 Eng. Law and Eq. 22; 1 Atk. 124; *Mandeville v. Welch*, 5 Wheat. 277.)

But an unaccepted bill of exchange does not of itself give the holder any interest in the fund or property against which it is drawn. In most of the cases cited the bills have been drawn against consignments in the ordinary course of business. *Cowperthwaite v. Sheffield*, 1 Sandf. 416—and on appeal, 3 N. Y. 243—is a leading modern case. The bills, with others, were drawn in Mobile, against shipments of cotton to Glasgow; were indorsed by defendant, and protested for non-acceptance. The cotton afterward arrived, but the drawers failed, and a contest arose respecting the funds in the hands of the drawee. The court held that the bills gave no specific claim upon the proceeds of the cotton, but treated them as ordinary bills of exchange, binding the drawees only upon acceptance, and not as orders for a specific fund. In *Luff v. Pope*, 5 Hill, 413, and on appeal, 7 Hill, 577, a general order or draft was treated as a bill of exchange, and not an order for a specific fund. (See also *Marine and Fire Insurance Bank v. Jauncey*, 3 Sandf. 257.) In none of these cases, nor in the cases cited from our own reports, was there any assignment in fact, nor evidence of present intention to assign to the holder of the bill the fund against which it was drawn.

An order for a specific fund usually contains something to indicate an intention to pass or appropriate the whole fund, as, "Pay to A. B. \$—, the amount of your collection from C. D.," or the amount received upon such or such a transaction. Or, it may not specify the character of the fund. But when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it—especially if advanced at the time, with no circumstances

The City of St. Louis, to the use of Murphy, v. Buckner.

indicating any remaining interest in the drawer—the order should be treated as evidence of an equitable assignment. In *Mandeville v. Welch*, 5 Wheat. 277, Judge Story makes the amount of the order—the fact that it is or is not drawn for the whole of a particular fund—a test of the obligation of the debtor to accept it. Upon an issue upon the fact of the assignment, involving the intention of the drawer and holder of the bill, consideration, etc., facts may transpire that would relieve the case from all embarrassment. But if it should merely appear that the bill was drawn in the usual course of business, was cashed by the holder, or received as security for or in satisfaction of an existing debt, and that it covered the precise amount already due the drawer from the drawee, we are not now called upon to say what effect should be given such a state of facts—whether the paper should be treated as an ordinary bill of exchange, or as an order for a specific fund, losing its character as a bill.

Though we find no error in sustaining the demurrer, yet, that the issue may be raised as indicated, the judgment will be reversed at the costs of the appellant and the cause remanded. The other judges concur.

THE CITY OF ST. LOUIS, TO THE USE OF BERNARD MURPHY,
Plaintiff in Error, v. GEORGE R. BUCKNER, Defendant in
Error.

1. City of St. Louis, to use of Murphy, v. Clemens, 43 Mo. 395, affirmed.

Error to St. Louis Circuit Court.

Thos. Grace, for plaintiff in error.

Peacock & Cornwell, and *Mumford*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This was a suit on a special tax-bill for the construction of a sewer, and involves identically the same question decided in *City of St. Louis, to use, etc., v. Clemens* 43 Mo. 395.

Rose v. Spies.

By reason of an instruction given by the court below, the plaintiff took a non-suit, and, failing to have the same set aside, he brings error to this court.

It is unnecessary to repeat the reasons which were given for our decision in the case just referred to. According to the views there expressed, the judgment is right and must be affirmed. The other judges concur.

EDWARD ROSE, Respondent, v. FREDERICK SPIES, Appellant.

1. *Attorney at law—Professional services, value of, a question of fact.*—The jury are the proper judges of the value of professional services rendered by an attorney at law; and, without some misdirection by which they were misled, there is no occasion for interference in their verdict by the Supreme Court.
2. *Instructions—Evidence.*—Instructions based upon a state of facts not in evidence are erroneous, and should not be given.
3. *Instructions—Commenting on evidence.*—A court has no right to comment on the evidence or single out particular facts and tell the jury that if they find them in a certain way they shall give their verdict accordingly.

Appeal from St. Louis Circuit Court.

The facts appear in the opinion of the court.

George P. Strong, and F. Spies, for appellant.

The first instruction given by the court, marked No. 1, amounted to a comment upon the evidence, and that of the most dangerous character. It virtually told the jury that they were not bound to decide according to the evidence in the cause, but might decide from all the circumstances of the case. This was nothing less than a commentary upon the evidence, and such a commentary as was calculated to destroy its force in the minds of the jury. This court has often decided that such instructions are erroneous. (*Chouquette v. Barada*, 28 Mo. 491, 499; *Anderson v. Kincheloe*, 30 Mo. 520; *Chambers v. McGiveron*, 33 Mo. 202; *Carroll v. Paul*, 16 Mo. 226; *The State v. Holmes*, 17 Mo. 379; *Loehner v. The Home Mut. Ins. Co.*, 19 Mo. 628.)

Rose v. Spies.

It is error to instruct the jury to find as they think proper. This was virtually the effect of one of the instructions given in this case. (3 Mo. 580.)

Peacock & Cornwell, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The appellant, who is an attorney-at-law, was employed by one Eliza Roessler to commence and prosecute a suit in her behalf for damages against Joseph Stehle. It appears that Stehle had contracted marriage with Miss Roessler, and, at the time the marriage was solemnized, he had a wife living. As soon as this fact came to the knowledge of Miss Roessler, she procured a sentence of nullity, and then instituted proceedings against him to recover damages for the injuries she had sustained in consequence of his wrongful act. The appellant, as her attorney, prosecuted the suit and recovered a judgment in her favor, and against Stehle, for \$6,000. He collected the judgment, with interest thereon, amounting to \$6,010, and tendered her \$3,005, claiming the other half as a compensation or fee in the case. This she did not accept. She assigned the judgment to the respondent, subject to whatever the appellant might be entitled to as a fee in the case; and the parties not being able to agree on the amount, this suit was brought. Upon a trial in the Circuit Court, the jury awarded appellant \$1,250 for his services, and from that verdict he has appealed to this court.

The only question in the case is the value of the professional services rendered; and unless the court committed error in admitting or rejecting testimony, or in giving or refusing instructions, the verdict cannot be disturbed. The jury were the proper judges of the value, and, without some misdirection by which they were misled, there is nothing presented for interference here. It is admitted that the appellant performed his duty most faithfully and creditably, and, as the verdict evinces, with signal effect. The appellant testified and attempted to show that there was a contract or understanding that he should have half the judgment, or all that he recovered over \$3,000, but this was entirely nega-

tived by Miss Roessler; and the credibility of the witnesses and the weight that should be given to their testimony was wholly for the jury. Several members of the bar were sworn as to what would be a reasonable compensation, and they differed as to amounts, but all placed it above the verdict of the jury.

The court, at the request of the respondent, gave three instructions. The first declared, substantially, that in the absence of a contract fixing the value of services at the price to be paid therefor, the person rendering the services had a right to a reasonable compensation, and that, in considering the reasonableness of such compensation, the jury might take into consideration all the circumstances of the case, and were not bound by the opinions of witnesses experienced as experts, but that those opinions should be considered in connection with the other evidence in the case.

The second instruction declared that if the jury believed from the evidence that the employment of the appellant was undertaken without any agreement as to the amount of his fees, then he was only entitled to recover a reasonable fee for his services.

The third instruction is in reference to an attorney's lien, but no question is raised concerning its correctness or propriety.

At the instance of the appellant, the court gave an instruction in reference to the effect of a contract if the jury found that one was made, to which there is no objection; but refused to give the second one offered, which declared that if the jury believed from the evidence that the suit for damages was an unusual one, and required unusual skill and care and labor to prosecute and maintain it, and that from the circumstances of the plaintiff in the case, or from any language used by her, or her attorney in her presence, it was understood between the plaintiff and her attorney that he was to be compensated out of whatever might be recovered, and that unless he recovered a judgment he could have no compensation for his services, and that in such case it is usual and customary for attorneys to receive one half the amount recovered, and that under all the circumstances such a proportion would be a reasonable compensation to the attorney for his services, then they should find for the defendant.

Ewing et al. v. Ewing.

This instruction was, I think, rightfully refused. All that is embraced in the first part in regard to an understanding or agreement as to the compensation was covered by the first instruction given for the appellant. As to that portion which declared that the attorney was to be compensated out of the judgment recovered or else get nothing, there was no evidence to support it, nor was it justified by any issue made in the pleadings. The balance was bad, because it attempted to set up a usage or custom, and no usage or custom was proved, even were it allowable in such a case. The objection urged against the first instruction given by the court at the request of the respondent is that it is a comment on the evidence. But this objection is not tenable. A court has no right to comment on the evidence or single out particular facts and tell the jury that if they find them in a certain way they shall give their verdict accordingly. But nothing of the kind is to be found in the instruction. The jury are told that the opinions of witnesses examined as experts are not conclusive, but that they are to be considered in connection with the other evidence. This placed the whole testimony and the weight of testimony before them in an unexceptionable form.

It is also objected that error was committed in admitting illegal evidence, but the evidence complained of was introduced to rebut and repel testimony given by the appellant, and was perfectly competent for that purpose.

Upon the whole case, we have failed to see any such error as calls for the interposition of this court, and the judgment will accordingly be affirmed.

W. H. EWING *et al.*, Respondents, *v.* MARY J. EWING, Appellant.

1. *Dower—Election, right of—Notice of—Construction of statute.*—A failure on the part of the County Court to give notice to the widow apprising her of her right to elect her dower, as provided by section 9, p. 670, R. C. 1855 (Gen. Stat. 1865, ch. 130, § 9), will not have the effect of prolonging the time within which she must make her election. (*Price v. Woodford*, 43 Mo. 247, affirmed.)

Ewing et al. v. Ewing.

*Appeal from St. Louis Circuit Court.**Bereman, and Gantt, for appellant.**McClelland & Thompson, for respondents.*

WAGNER, Judge delivered the opinion of the court.

This was an action for partition, brought by the plaintiffs as heirs of James S. Ewing, deceased, for the assignment of dower to the defendant as surviving widow. It was admitted that defendant owned one-fifth of the premises as purchaser; and she also claimed that she was entitled to one-half of the balance as her dower interest, under section 5 of the chapter on dower in the Revised Code of 1855, which is applicable to and governs this case. This claim was rejected, on the ground that she had not filed her declaration electing to take under that section within one year. It seems that she was never notified of her right to elect by the County Court of the county where administration was granted, and did not attempt to comply with the law by filing her written declaration, properly acknowledged, till several years after administration was granted, and not until after the administration on the estate was wound up and closed.

The case is precisely similar to *Price v. Woodford*, 43 Mo. 247, decided at January term, where we held that a failure on the part of the County Court to give the notice to the widow would not have the effect of prolonging the time within which she must make her election. This case was brought here without any knowledge of that decision being made by the counsel for the appellant, and they have filed a very full and learned brief, and ask for a review of the decision. We have re-examined the question attentively and carefully, and are satisfied with the conclusion reached in that case. It is unnecessary to repeat the reasons which lead to that conclusion.

Judgment affirmed. The other judges concur.

JESSE ARNOT *et al.*, Respondents, v. BASIL W. ALEXANDER,
Appellant.

1. *Landlord and tenant—Leases—Renewal, covenant of—Indefiniteness in, how may be cured by court of chancery.*—Leaving the amount of rent for the renewal term of a lease to be ascertained by what “responsible parties would agree to give for the use of the premises” fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease; and a court of chancery may in either case hear evidence and determine for itself the rentable market value of the premises where the appraisement fails. What “responsible parties will agree to give” for the use of the rentable business property is nothing more than its full or highest rentable value.
2. *Landlord and tenant—Lease—Renewal, covenant of—Violation of, lessee has what remedy.*—Where by the covenant for renewal of a lease the lessee is entitled thereto, “provided that parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give,” it is in every way reasonable and just that the lessee should elect his remedy, and either take damages at law or have a specific performance in equity.

Appeal from St. Louis Circuit Court.

Rankin & Hayden, for appellant.

Equity will not give certainty and definiteness to a contract which, as in the case at bar, the parties have left utterly uncertain and indefinite. It is only where the terms of a covenant to renew are express and unequivocal that specific performance will be enforced. (Taylor on Land. and Ten. §§ 332, 333; Fry on Spec. Perf. § 203; Robinson v. Kittelas, 4 Edw. Ch.; Whitlock v. Duffield, 1 Hoff. Ch. 110; Hammer v. Eldowney, 46 Penn. St. 334.) The phrase “as much as any responsible parties will agree to give” does not mean merely “the highest market price.” The defendant might possibly have found parties who, from their circumstances or peculiar facilities for the business, were willing to go beyond the highest market price; and if so, how could the court below, by a construction, deprive him of a chance—no matter how small a chance—which his contract gives him? The present case must not be confounded with that class of cases where, though some term of the contract has not been defined, a method has been expressly pointed out by the parties

Arnot et al. v. Alexander.

by which it may be defined, as where the parties say "at such sum as shall be appraised," "at such sum as shall be fixed upon by indifferent persons," etc., etc. These cases go further than many courts have approved, but they are defended on the ground that a specific and particular mode has been by the parties themselves pointed out, and that the event has only to follow out that mode as the parties would have done themselves; but where that particular mode cannot be followed out, or where not only a particular mode but particular parties are selected, and such parties can not or will not act, equity will not attempt to enforce the contract. (Wilkes v. Davis, 3 Meriv. 506; Morgan v. Milman, 17 Eng. L. and Eq. 203; Baker v. Glass, 6 Munf. 212; Wallingford v. Wallingford, 6 Har. & J. 490; Bromley v. Jeffries, 2 Vernon, 415; Cooth v. Jackson, 6 Ves. Jr. 34; Milnes v. Gery, 14 Ves. 400; Blundell v. Brettargh, 17 Ves. 232; Garnley v. Duke of Somerset, 19 Ves. 429; Agar v. Marklew, 2 Sim. & S. 418; Darbey v. Whittaker, 4 Drew. 134; Ld. Ormond v. Anderson, 2 B. & Beat. 363; Stratford v. Bosworth, 2 Ves. & B. 341.)

Cline, Jamison & Day, for respondents.

I. The petition contains a cause of action; for the contract in issue is not one for a new lease, but a covenant to renew the old one, and adopts all of its terms and covenants, except as to time and the amount of rent to be received in the renewal. (9 Ves. Jr. 325; 3 Atk. 83; 7 East. 237.)

II. The covenant does not fix the amount of rent to be reserved, but points out the means whereby it is to be and can be determined. (Hall v. Warren, 9 Ves. Jr. 605; Blackmore v. Boardman, 28 Mo. 420; Finney v. Cist, 34 Mo. 303; Garnhart v. Finney, 40 Mo. 449.)

III. This court has repeatedly held that a covenant for renewal is valid and binding when the rent to be reserved is to be determined by arbitrators, one to be chosen by each party, and they to choose the third, although the lessor refuses to appoint any one to arbitrate. Here the court will hear evidence

Arnot et al. v. Alexander.

and fix the value of the rent, and decree specific performance or hold the lessor liable in damages for his breach of covenant. (28 Mo. 420 ; 40 Mo. 449.)

CURRIER, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity, praying for the specific execution, on the part of the defendant, of his covenant to renew a lease. The covenant is in these words: "If this lease shall not be terminated by forfeiture or any other cause before the expiration of the five years, then said lessee or his legal assigns shall be entitled to a renewal of the same for five years longer; provided said parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give."

The conditions upon which this covenant for renewal was to be executed have been complied with, and it is not insisted that its non-execution would not be injurious to the plaintiffs. The case would therefore seem to fall within the jurisdiction of chancery, and warrant a decree for a specific performance of the covenant on the part of the lessor. But it is insisted on the part of the defendant that the covenant is vague and uncertain; that equity will not give certainty and definiteness to an obligation which the parties have left uncertain and indefinite; that it is only where the terms of a covenant for renewal are express and unequivocal that specific performance will be enforced in chancery. The uncertainty and indefiniteness complained of, upon which the defense is rested, are supposed to attach to the provision respecting the *quantum* of rent to be reserved for the renewal term of the lease. The provision itself is express and unequivocal, although it fails to fix a specific amount of rent. That was to be determined by what other responsible parties would "agree to give" at the expiration of the first term of five years. The amount of rent thus to be reserved is no more uncertain or indefinite than it is in all that class of cases where the amount of rent for the renewal terms is left to be determined by the valuation of third parties. In these cases it is not denied that the covenant for renewal is sufficiently definite, express, and unequiv-

Arnot et al. v. Alexander.

ocal, to justify their enforcement in chancery. The court, in such cases, will hear evidence and fix the amount of rent, and decree specific performance or hold the covenantor liable in damages for the breach of his covenant. (Hall v. Warren, 9 Ves. Jr. 605; Blackmore v. Boardman, 28 Mo. 420; Finney v. Cist, 34 Mo. 303; Garnhart v. Finney, 40 Mo. 449; 2 Sto. Eq. Jur. §§ 722, 751.) Leaving the amount of rent for the renewal term of the lease to be ascertained by what responsible parties would agree to pay for the use of the premises fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease, each selecting one, with authority in these to select a third in case the two should disagree. The standard of valuation would be the same in both cases, to-wit: the rentable market value of the premises at the time the valuation should be made. If the court may hear evidence and ascertain for itself the value when the appraisal fails through a refusal to appoint an appraiser, why may it not hear evidence and decide the value when the appraisal fails from some other cause? The whole supposed difficulty rests upon the idea that what "responsible parties will agree to give" for the use of rentable business property is different from and may be "something more" than its full or highest rentable market value. This view of the subject we conceive to be erroneous. For whose benefit and to what end was this clause of renewal introduced into the deed of lease? Evidently it was intended for the benefit of the lessee, and may be supposed to have formed an inducement to the original renting. If the condition to the renewal included the payment by the lessee of anything more than the highest rentable market value of the leased premises, of what advantage could it be to him? Such a construction of the clause defeats the evident purpose and understanding of the parties, as that purpose and understanding is gathered from the language they employ. The lessee, instead of being put to a disadvantage in the general competition, was to be a favored party. By the terms of the contract he was to have the preference over other responsible bidders, and the irresponsible were excluded from the circle of competition. The

The Cheltenham Fire-Brick Co. v. Cook.

amount of rent, therefore, was to be determined from the competition that might arise between exclusively responsible bidders in a fair and open market—that is, by the market value of the premises at the time of renewal. It is to be presumed that the parties contracted with reference to fair, reasonable, and practical results, and the language employed by them should have a fair, reasonable, and practical construction. While equity does not make contracts for parties, it gives construction to contracts which parties make for themselves, and therein employs the same rules of interpretation which prevail in courts of law. No forced construction which calculates remote chances and possibilities, and which tends rather to defeat than give effect to the real purposes of the contract, will be resorted to in order to turn an injured party over to inadequate legal remedies. It is against good conscience that the lessor in this case should be allowed a right of election whether he will honestly perform his covenant or simply pay damages for a breach of it; but it is in every way reasonable and just that the lessee should elect his remedy, and either take damages at law or have a specific performance in equity. (2 Sto. Eq. Jur. § 717 *a.*) The case presents no insuperable difficulty in the way of this just result being reached. With the concurrence of the other judges, the judgment of the court below is affirmed.

THE CHELTENHAM FIRE-BRICK COMPANY, Respondent, *v.* ISAAC
COOK, Appellant.

1. *Evidence—Bonds—Sureties—Admissions of principal.*—Admissions made before the execution of a bond by one who afterward executed it as principal, and which were not made in the progress of any business intrusted to him by the surety, and formed no part of the *res gestæ* of the subject matter of the suit, are not evidence against the surety on the bond, and should not be admitted in a suit on the bond against the surety. The statements made by the principal, at the time the bond was executed, in the presence of the other parties, and as a part of that transaction, stand on a different footing, as would any statement made by him in the progress of fulfilling the conditions of the bond.

The Cheltenham Fire-Brick Co. v. Cook.

2. *Contracts — Illegal consideration — Compounding a felony — Knowledge of crime, when necessary to make consideration illegal — Construction of statute.*—Where a criminal prosecution had been initiated, by the owners of the money taken, against a defendant for embezzlement, and the defendant in such prosecution, with another person as principal, executed a bond to refund the money embezzled to the owners, upon an agreement, express or implied, by the owners or their agent, to compound and cancel said crime and abstain from any prosecution therefor, it was not necessary, in order to establish the illegality of such consideration, to allege or prove that the obligees in the bond, who had initiated the criminal prosecution, had knowledge that a crime had in fact been committed. The statute (Gen. Stat. 1865, p. 801, § 15) has no application to such a case. It makes certain acts offenses, and provides the mode and measure of punishment for the wrong-doer; but it was not intended to legalize contracts which were void at common law, as against public policy, and of unsound tendency and character. But where no prosecution has been instituted, it is necessary to allege the fact that a crime has been committed, and that a party taking an obligation in consideration of forbearance to initiate a prosecution had knowledge of the existence of the supposed crime.
3. *Contracts — Consideration — Illegality of, how determined.*—Whether an obligation is tainted with an illegal consideration, and void for that reason, is a question to be determined by common law, and not by the statute.
4. *Contracts — Validity — Good consideration unaffected by an illegal agreement.*—If a bond, given by one who has embezzled money to its owners, is given to secure the said money to the owners, and in consideration of that indebtedness and of the agreement on the part of the creditors to give an extension of time in which to make payments as therein expressed, unaffected by any agreement or understanding by the obligees on the bond or their agent that a criminal prosecution pending against the principal in the bond for such crime should, in consequence, be abandoned, and no other commenced, then there is no objection to the bond as far as the consideration is concerned.
5. *Bond — Trust — Practice, Civil — Parties.*—Where a bond is executed for the payment of money to the obligee, part for his own use and part for the use of another, the obligee may sue in his own name, on his own behalf and as trustee for the other. A payment to the obligee, in accordance with the bond, of any money due to the *cestui que trust* would be a satisfaction of the demand, and the obligors in the bond could not be called upon to account again.

Appeal from St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

Krum, Decker & Krum, for appellant.

I. The Circuit Court erred in admitting in evidence the statements of Theodore Cook, made to Charles M. Elleard, A. B. M. Thompson, and Richard J. Howard, concerning the amounts of

The Cheltenham Fire-Brick Co. v. Cook.

money for which he was in arrear to his employers. These statements of Theodore were not made in the presence of the defendant, nor while he was authorized by any relation which he held to the defendant to bind him by his admissions. The defendant, by his writing, had promised to pay, not what Theodore Cook may have admitted to be due, but whatever amount was due in fact by Theodore to his employers. The indebtedness of Theodore to his employers was to be proved. This could be shown by the books he had kept while in their employ, settlements between them, etc.; but, clearly as against his surety, it was not competent to show it by declarations to third parties in the absence of the defendant and unconnected with the course of his business. (1 Phil. Ev. 525, 4th Am. ed.; 1 Greenl. Ev. § 187; State, to use of Squire, v. Bird, 22 Mo. 473; Blair v. Perpetual Ins. Co., 10 Mo. 567.) The admissions of a surety to bind his principal stand on the same footing of admissions of an agent to bind his principal. The declarations of the agent bind the principal only when they are made during the existence of the agency and in the line of his duties. (Rogers v. McCune, 19 Mo. 557; Ready v. Steamboat Mary, 20 Mo. 264.)

II. The defendant's promise was *nudum pactum*, and absolutely without any consideration valid in law. He received nothing, nor did plaintiff give up any right or suffer any inconvenience. (a) The illegality of the consideration, or the absence of a consideration, may be given in evidence as a defense to a promise, though the promise be under seal. (Gen. Stat. 1865, p. 686, § 24; Collins v. Blantern, 1 Sm. Lead. Cas. 154; and cases hereinafter cited.) (b) An antecedent debt due by A. to B. constitutes of itself no binding consideration for the promise to pay by a stranger, although the promise of the stranger be in writing. A written promise is necessary, by the statute of frauds, to make one party liable for the debt of another; but the statute of frauds does not dispense with the necessity of a valid consideration. (Cook v. Elliott, 34 Mo. 586.) ✓ Where the promise of the surety is made at the time of the creation of the debt, such debt is a sufficient consideration. But where the promise of the surety is made after the debt has been created, the past debt is not *per se*

The Cheltenham Fire-Brick Co. v. Cook.

sufficient consideration. (*Robertson v. Findley*, 31 Mo. 388; *Pfeiffer v. Kingsland*, 25 Mo. 66.) Where the promise of the surety is made in consideration of extension of time granted to the principal debtor, the creditor must be bound to give the extension, else there is no consideration which will bind the surety. (*Russell v. Buck*, 11 Verm. 166; *Deacon v. Gridley*, 28 Eng. L. and Eq. 345; 15 C. B. 295.) Mutual promises, of course, constitute valid considerations to pay the debt of another, but such promises must be mutually binding. (*Pars. Cont.* 448, 5th ed., cited in 41 Mo. 391.) In this State it is conclusively settled that a promise to give time by a creditor is not binding on the creditor and does not estop the creditor from collecting his debt by suit. (*Bridge v. Tiernan*, 36 Mo. 439.) Hence, such promise by a creditor to extend time still leaves the creditor to his right to sue at once, and is therefore no valid consideration for the promise of a stranger to pay the debt or secure its payment.

III. If an agreement to dismiss a pending criminal prosecution forms in whole or in part the inducement or consideration for a promise, such promise is absolutely void. The doing of any act by the promisee prohibited by law, or against the policy of the law, is an illegal consideration for a promise. Any promise made wholly or in part in consideration of the doing of something prohibited by law, or against public policy, or against public morals, is absolutely void. It is clear that if a contract be made on several considerations, one of which is illegal, the whole promise will be void. (*Featherston v. Hutchison*, Cro. Eliz. 199; *Waite v. Jones*, 1 Bing., N. C., 662; *Shackell v. Rosier*, 2 Bing., N. C., 634; *Howden v. Haigh*, 11 Ad. and El. 1036; *Crawford v. Morrell*, 8 Johns. 253.) The stifling of any criminal prosecution, commenced either by indictment of a grand jury or by complaint before an examining magistrate, is against the policy of the law, and hence is an illegal consideration (or rather no valuable consideration) for a promise. (*Pars. Merc. Law*, 29; *Coppock v. Bower*, 4 Mees. & W. 361.) Although the security for a debt or the promise of payment of a debt constitutes a part of the consideration for the promise of a stranger,

The Cheltenham Fire-Brick Co. v. Cook.

yet if part of the consideration be the promise to dismiss a criminal prosecution it taints the promise and makes it void *in toto*. (9 Ad. & El. 371; Clark v. Ricker, 14 N. H. 48; Gardner v. Maxey, 9 B. Monr. 90; Town of Hinesburg v. Sumner, 9 Verm. 23; Bell v. Wood's Adm'r, 1 Bay, 249; Den v. Moore, 2 South. 470; Badger v. Williams, 1 Chipm. 137; Raguett v. Roll, 7 Ohio, 76; Shaw v. Spooner, 9 N. H. 197; 22 Am. Jur. 23, 24; Bank v. Matthewson, 5 Hill, 252.) The receiving back of one's own goods or money taken by theft, larceny, or embezzlement, upon agreement not to prosecute, and with or without a reward for so doing, is a punishable offense at common law. (1 Hale's Crim. Prac. 546.) If A., who hath his goods stolen by B., receives them back again upon agreement not to prosecute, or to prosecute faintly, this is *theft bote*, and punishable by imprisonment. (1 Hale's Crim. Prac. 619; 2 Blackst. Com. 133.) Sections 15 and 16, Gen. Stat. 1865, p. 801, make it a felony to compound a felony, and a misdemeanor to compound a misdemeanor.

IV. The instruction given by the court, of its own motion (in lieu of the second and third instructions asked by defendant and refused), is erroneous, and tended to mislead the jury. This instruction in effect declares that the agreement of Howard to dismiss the criminal prosecution then pending was not an illegal consideration, unless Howard knew that Theodore Cook was guilty of the crime of embezzlement. Under this instruction, before the jury could find for defendant, they were required to find not only that the promisee had instituted a criminal prosecution against Cook, and had dismissed or agreed to dismiss such criminal proceedings as the consideration for obtaining this promise, but also that the promisee knew that Cook was guilty of having embezzled moneys; in other words, that the dismissal of a criminal prosecution as the consideration for a promise did not *per se* render such executory promise void. No adjudged case can be found in the reports which warrants this position. No author can be cited who approves such a doctrine. No valid reason can be urged to sustain it. But, on the contrary, all the adjudged cases, from the leading case of Collins v. Blantern

The Cheltenham Fire-Brick Co. v. Cook.

(1 Sm. Lead. Cas. 154) down to the latest American authority, uniformly hold the doctrine that any executory promise, founded in part or in whole upon an agreement to dismiss or stifle or embarrass any criminal process pending, is absolutely not enforceable against the promisee.

V. The petition in this case is not sufficient to sustain the judgment of the court below. It does not appear from the petition whether the plaintiff sues for money belonging to the plaintiff or to Evans & Howard. The plaintiff does not state that it is either the assignee or trustee of Evans & Howard, in respect to the moneys of the latter firm which Theodore Cook embezzled. Where a party sues as assignee of a chose, or as trustee of an express trust, the character in which he sues should be stated. It is traversable matter. The instrument contains several promises to pay several sums of money to different parties. The question, then, arises, in what capacity does the plaintiff sue in this case? Is it as trustee of an express trust? Then it should appear by apt averments that the plaintiff sues for the money due to Evans & Howard, and for which the defendant became bound. This does not appear. So, on the other hand, if the plaintiff seeks to recover the money due to itself, it should be so averred in the petition. Though several causes of action arising out of the same transaction may be united in the same petition, yet they must be separately stated. (Field v. Meyer, 37 Mo. 434.) The judgment asked for in a petition is a material part of it. (Rutherford v. Williams, 42 Mo. 18.) It is plain in this case that the pleader has blended two separate and distinct causes of action in the same count, and judgment is asked *in solido* for two separate and distinct causes of action.

Glover & Shepley, for respondent.

I. The cause of action on the bond was complete as soon as the thirty days had passed.

II. The action was well brought in the name of the Cheltenham Fire-Brick Company. The bond was made in trust to the corporation to cover all the moneys embezzled by Cook. The bond was beneficial to Evans & Howard, and the law presumes

The Cheltenham Fire-Brick Co. v. Cook.

their assent to it; and when the defendant Cook has settled with the Cheltenham Fire-Brick Company for the moneys due to Evans & Howard, they cannot call on him to account again. (*Miles v. Davis*, 19 Mo. 408; *Sto. Eq. Pl.* § 150; *Gen. Stat.* 1865, p. 651, § 3.) A trustee of an express trust may sue in his own name.

III. That Theodore Cook was under arrest at the time the bond was given is no defense, provided the process was not abused to any purpose of injustice. (*Taylor v. Cottrell*, 16 Ill. 93; *Holmes v. Hill*, 19 Mo. 160; *Nealley v. Greenough*, 5 Foster, 325.) The bond was not invalid as to Theodore, though given while in prison, if he gave it for no more than he honestly owed. (*Bates v. Butler*, 46 Me. 393; 1 *Blackst. Com.* 136.) If the bond was not given for more than was right, it was binding on Isaac Cook, of course, for Isaac Cook was not in prison. He can plead no duress, for he was in no restraint. This is not a statutory obligation. (*Thompson v. Lockwood*, 15 Ill. 259; *Jones v. Turner*, 5 Litt. 147; *Mantell v. Gibbs*, *Brownlow*, 64; *McClintock v. Cummins*, 3 *McLean*, 158; *Robinson v. Gould*, 11 *Cush.* 57.) To avoid the bond, duress must be offered to the party pleading it.

IV. The money taken by Theodore Cook, the thirty days' indulgence to Theodore, the annual indulgence in case of security given, and the one dollar paid to Isaac Cook to sign the bond, were each of them valuable consideration to support the bond. (*Sto. on Cont.* 536; *Fell on Guar.* 3.)

V. If the bond was made to compound the felony of embezzlement, it is admitted to be void. But the question of that consideration was distinctly submitted to the jury, who found that no such consideration existed. It is not compounding to abandon a prosecution, unless paid or agreed to be paid therefor. A man may secure by contract money stolen or embezzled without compounding the felony. One does not necessarily imply the other.

VI. The statements of Theodore Cook as to the amount of money owing by him were competent evidence. It is the condition of the bond that Theodore Cook shall have thirty days within which to "account for and pay over" the money due; that is, Theodore is to fix the amount—state the account. Theodore's

The Cheltenham Fire-Brick Co. v. Cook.

admissions—Theodore's statements—are expressly stipulated for. Isaac Cook knew nothing about it. Theodore knew all about it, and his adjustment would bind Isaac, so the bond says. And we insist that if we can show that Theodore at any time stated the account, it fixes the amount of it, and is conclusive upon Isaac Cook. But Theodore and Isaac are co-obligors in the bond. The bond relates to past transactions of Theodore. And it is a general rule that the admission of one obligor binds another, independent of the agreement in the bond that it shall be so. Isaac contracts that Theodore's adjustment of the account shall be his adjustment. Theodore's admission at any time is conclusive on him as to his adjustment. If the position assumed by defendant is correct, there might be no way to prove the debt at all. If the books did not show the amount embezzled, all Theodore need do to save Isaac would be to close his lips. And though he had repeatedly stated the account prior to signing the bond, it could not be heard as evidence.

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs sue on a written obligation or bond, which is in the following words:

"This obligation witnesseth: Whereas, Theodore F. Cook has been employed as book-keeper and treasurer of the late firm of Evans & Howard, also of the Cheltenham Fire-Brick Company, and in that capacity has received and improperly appropriated to his own use moneys of said concerns to an unknown amount, for which he is still in arrears, not having accounted therefor; and whereas, said concerns are willing and hereby consent that said Cook may have thirty days' time within which to account for and pay over said sums of money: now, in consideration of the premises, and of the sum of one dollar by the Cheltenham Fire-Brick Company paid to said Theodore F. Cook and Isaac Cook, they each do hereby obligate themselves to pay to said Cheltenham Fire-Brick Company for their own use, also for the use of Evans & Howard respectively, all such sums of money as are now due said Cheltenham Fire-Brick Company and said Evans & Howard; said payments to be made, or to be secured to the satisfaction of the

The Cheltenham Fire-Brick Co. v. Cook.

Cheltenham Fire-Brick Company, within thirty days from the date thereof: *provided*, the said Isaac Cook shall not be held under this writing for an amount to exceed forty-five hundred dollars, to be paid in installments of one thousand dollars per year, with — per cent. interest.

“In witness whereof, said parties hereto set their hands and seals, at the city of St. Louis, the third day of August, A. D. 1867.

“T. F. Cook. [Seal.]

“I. Cook. [Seal.]

“Witness: CHAS. M. ELLEARD.”

The petition alleges that at the time of the execution of said bond Theodore F. Cook was in arrears to Evans & Howard in the sum of \$8,000, and in a like sum to the plaintiffs, and to the two in a sum not less than \$16,000. The answer denies these allegations, and then proceeds to set up an affirmative defense, alleging substantially that the bond is without consideration, illegal, and void—having, as the answer avers, been given in the compounding of a felony. It is alleged that R. J. Howard, acting therein as the agent of the plaintiffs and of the firm of Evans & Howard, procured the arrest of said Theodore upon a warrant issued by a justice of the peace, August 3, 1867, founded upon Howard's affidavit charging Theodore with embezzling the funds of the plaintiffs and of said Evans & Howard; that the bond in suit was executed while said Theodore was under arrest, and in consideration of the agreement of said Howard to discharge him therefrom and to suppress and abandon said criminal proceedings. The plaintiffs replied, taking issue upon these averments.

At the trial, the bond sued on was read in evidence. In order to show the amounts due thereon, the plaintiffs gave in evidence the statements and admissions of Theodore F. Cook to third parties, made prior to the execution of the bond, and not in the presence of Isaac Cook. The defendant objected to this testimony, and duly excepted to the ruling of the court admitting it. These admissions ought to have been excluded. They were not evidence against Isaac Cook. The relation of principal and surety did not exist between him and the principal of the bond at the time the admissions were made. They were not made in the pro-

The Cheltenham Fire-Brick Co. v. Cook.

gress of any business intrusted to Theodore by the defendant, and formed no part of the *res gestæ*. (1 Greenl. Ev. § 187; 22 Mo. 470.) Besides, the bond did not require Isaac Cook to pay such sum as Theodore may have said was due, but only such amount as might turn out in fact to be due on an adjustment of the accounts, not exceeding \$4,500. The statements made by Theodore at the time the bond was executed, in the presence of the parties and as a part of that transaction, stand on a different footing, as would any statement made by him in the progress of the adjustment of the accounts as contemplated by the bond.

The more important branch of the case, however, is covered by the instructions. The court refused all the instructions asked by the defendant, and in lieu of them, upon its own motion, gave the following:

“If Richard J. Howard, at the time of the execution of the instrument sued on, had knowledge that Theodore F. Cook, as book-keeper and treasurer of Howard & Evans and also of plaintiffs, had moneys belonging to said Howard & Evans and plaintiffs, by virtue of his employment as such book-keeper and treasurer, and converted said moneys to his use without the assent of said Howard & Evans, and without the assent of the plaintiffs, and that the instrument sued on was made by said Theodore F. Cook and the defendant Isaac Cook, upon an agreement or understanding, express or implied, to compound or cancel said crime or to abstain from any prosecution therefor, the jury should find for the defendant, notwithstanding that they may also find that said Theodore F. Cook was, at the time of making said instrument, indebted to said Howard & Evans and plaintiffs for the moneys so received and converted to his own use, and it was also intended that said instrument should be security for the payment of the whole or any part of said moneys.”

This instruction assumes that it was necessary to the success of the defense that the jury should find, as a material and necessary fact, that Howard, at the time of the execution of the bond and of his supposed agreement to smother the then pending criminal proceedings, “had knowledge” that the crime of embezzlement imputed to said Theodore had actually been committed by him.

The Cheltenham Fire-Brick Co. v. Cook.

In other words, it directed the jury that unless they found a fact not alleged in the answer, the defense must fail; for the answer does not aver that Howard "had knowledge" that Theodore F. Cook had committed any criminal offense whatever. If the instruction contains a correct exposition of the law, then the affirmative defense alleged in the answer was insufficient and might have been stricken out on motion. To a considerable extent the instruction is in the language of the statute (Gen. Stat. 1865, p. 801, § 15), and appears to have been framed upon the theory that an agreement to suppress a pending prosecution, in order to be of a character to vitiate the consideration of an obligation founded upon it, must have been an agreement made criminal by that enactment, subjecting the party taking the obligation so induced to the particular penalties therein provided. If the theory were a correct one, the instruction would still be bad for its misleading character, since it could hardly fail to convey to the minds of the jury the idea that the "knowledge" it speaks of must have been of a direct and personal character—as that Howard witnessed the commission of the offense, or that he had other equivalent knowledge that the alleged offense had been committed.

But it is apprehended that the statute has no application to the case. It makes certain acts offenses, and provides the mode and measure of punishment for the wrong-doer; but it was not intended to legalize contracts which were void at common law, as against public policy, and of an immoral tendency and character. Whether the obligation sued on is tainted with an illegal consideration, and void for that reason, is a question to be determined by the common law, and not by the statute.

The answer unquestionably states a good defense. It alleges that the plaintiffs' agent had initiated a criminal prosecution against Theodore F. Cook; that a warrant issued thereupon, and that by virtue of it Cook was taken into the custody of an officer, and that while thus under arrest the bond in question was executed, upon the consideration that Cook should be discharged, the prosecution suppressed, and no further prosecution instituted against him; that Howard agreed to all this, and that, upon the execution of the bond so founded upon such agreement, Howard,

The Cheltenham Fire-Brick Co. v. Cook.

in fulfillment of his promise to do so, discharged Cook and dismissed the prosecution. These facts, if established in proof, destroyed the bond, and the jury should have been so instructed. Whether the prosecution was originated as an appliance to collect a debt, or was founded in the truth, it was not material to inquire. It was pending, and the public have an interest that such prosecution should be carried on to conviction or acquittal. It was not necessary that the answer should allege, and it does not allege, that any crime had been committed. And it could not therefore be necessary either to allege or prove, or for the jury to find, that Howard "had knowledge" that a crime had in fact been committed. (*Steuben County Bank v. Matthewson*, 5 Hill, 249; *Himsbough v. Sumner et al.*, 9 Vt. 23; *Clark v. Ricker et al.*, 14 N. H. 44; *Raguet v. Roll*, 7 Ohio, 74; *Howden v. Haigh et al.*, 11 Ad. & El. 1036.)

(But when no prosecution has been instituted, the rule is different. In such cases it is necessary to allege the fact that a crime has been committed, and that the party taking an obligation in consideration of forbearance to initiate a prosecution "had knowledge" of the existence of the supposed crime. (5 Hill, 249.)

If the bond, however, was given to secure the amount of money due from Theodore F. Cook to the plaintiffs and Evans & Howard, and in consideration of that indebtedness and of the agreement on the part of the creditors to give an extension of time in which to make payments as therein expressed, unaffected by any agreement or understanding with the plaintiffs' agent that the pending prosecution should, in consequence, be abandoned, and no other commenced, then there is no objection to it so far as the consideration is concerned. Nor was the suit prematurely brought. The fair construction of the instrument is that the balances against Theodore Cook should be ascertained and satisfactorily secured in the course of the thirty days following its execution, and that, upon this being effected, in accordance with the terms of the agreement Isaac Cook should be required to pay no more than \$1,000 yearly of the amount assumed by him. But satisfactory security was to be given before he could demand this additional time.

Blackman v. Welsh et al.

Nor is there any objection to the suit being brought in the name of the plaintiffs, in their own behalf and as trustees of the express trust stated in the bond. (Gen. Stat. 1865, p. 651, § 3; Miles v. Davis, 19 Mo. 408; Sto. Eq. Pl. § 150.) The arrangement was to pay directly to the plaintiffs an aggregate amount, composed of the balances due by Theodore F. Cook to the two establishments; Howard, of the firm of Evans & Howard, assenting thereto. Besides, as the arrangement was beneficial to Evans & Howard, the law presumes their assent to it. A payment to the plaintiffs, in accordance with the bond, of any balance due Evans & Howard, would be a satisfaction of the demand, and the obligors in the bond could not be called upon to account again.

The other judges concurring, the judgment of the court below is reversed, and the cause remanded for trial in accordance with this opinion.

JOEL BLACKMAN, Appellant, v. CATHERINE WELSH *et al.*,
Respondents.

1. *Landlord and tenant—Rent, demand of—Possession.*—Where a lot of ground was leased by a verbal lease, and the lessee took possession of and held only a part of the ground leased, and other parties afterward entered upon and occupied the remainder of the lot under other leases, and the lessor brought suit on the lease against all the occupants for the possession of the lots, for non-payment of rents, it was not sufficient to sustain his suit that the lease was made and the land held and the rent not paid; it was necessary that demand of the rent from the lessee should have been made before there could be a forfeiture. And as to the other persons who were on the rest of the land, it was necessary that they should have entered under the lessee, or after possession by the lessee, or that they illegally dispossessed him.
2. *Landlord and tenant—Possession.*—The question of actual possession is a question of fact; what would constitute possession is a question of law.

Appeal from St. Louis District Court.

The facts sufficiently appear in the opinion of the court.

Isaac T. Wise, for appellant.

I. All others besides the lessee, upon the strip of land leased, were either under the lease, and so liable to all its conditions, or

not under the lease, and so liable to be put off as trespassers against the peaceable possession of the lessee by him; and upon forfeiture by the lessee the lessor acquires the right of possession under the statute. (*Spalding v. Marshall*, 27 Mo. 377; *Burns v. Patterson*, 27 Mo. 434.)

II. Where a lessor leases to a tenant and puts him in possession under a lease, and, on suit brought for possession by lessor, third parties are found located upon different portions of the leasehold, such parties must be in possession either subject to the tenancy or adverse to it. In the first case, their right to remain expires with the tenancy. In the latter, they are subject to be put off the land for a forcible entry and detainer by the tenant at any time, and so by the landlord upon the lease being avoided and the right of possession reverting to him; and, in the latter case, in like manner in a statutory proceeding to recover possession on account of non-payment of rent, which provides for just this contingency by the use of the words "other person," which relieves the landlord from the necessity of proceeding by a separate suit of forcible entry, etc., against such, besides the suit against the tenant for rent and possession by reason of the refusal to pay rent. (*Gen. Stat. 1865*, ch. 74, §§ 33, 35; *Shepard v. Martin*, 31 Mo. 492.)

IV. If the ruling of the court below is sustained, it follows, so far as it declares the law, that if a lessee permits trespassers to take possession of part of the land leased, and does not object or put them off, the statute of limitations must begin to run in their favor, because their holding is adverse; and that it runs not only against the tenant, but against the landlord also (though he is unable to bring suit for forcible entry or ejectment, as he has no right of possession).

Glover & Shepley, for respondents.

There was no privity shown to exist between Catherine Harney, now Welsh, to whom a verbal lease was made, and any other defendant except Edward Welsh, nor any possession of the property, except the sixty-five feet, by Catherine Harney, or any one holding through or under her; but on the contrary the other

Blackman v. Welsh et al.

defendants have always been in possession adverse to plaintiff and Catherine Welsh. There is no evidence that the plaintiff had any possession of anything except the sixty-five feet, or that he ever put Mrs. Harney in possession of anything except the portion occupied by her, or that she or anybody through or under her occupied any more; but on the contrary the defendants all hold, and did always hold, the other part of the lot sued for adverse to all these persons.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings his action against Catherine Welsh, her husband and others, for forcible detainer, claiming that before she was married he verbally leased to her, by her then name, Catherine Harney, a narrow strip of land, bounded north by Division street, east by Twentieth street, and west by Twenty-first street, in the city of St. Louis, for the term of nine years from March 1, 1862, at a ground rent of twelve dollars per annum; that the sum of thirty dollars is now due, the payment of which has been demanded and refused. Several persons were occupying the land, besides Mr. and Mrs. Welsh, who were made parties to the proceeding. Judgment of restitution was rendered by the justice, and defendants appealed to the Circuit Court, where, upon trial, the plaintiff obtained a judgment of ouster for sixty-five feet only from the west end of the strip, the whole being three hundred and eighty-six feet in length by sixteen and a half feet in width. He appeals to this court, claiming that he should have had judgment for the whole, and also for the back rents.

It appears from the testimony that Mrs. Harney (now Mrs. Welsh), in the spring of 1862, having had a lease for ten years of a lot on the opposite side of Division street, verbally agreed with the plaintiff to give up the former lease and take a lease for the remainder of her term (nine years) of the land in controversy, and that she immediately moved a small house upon the west end of the strip, paid her ground rent until 1864, when her husband refused to pay longer, and in 1865 took a lease from one Chambers of a parcel of land, including this west end of the strip

leased by his wife. There was testimony tending to prove that neither Mrs. Welsh nor her husband ever took possession of any part of the strip except sixty-five feet, and that the other occupants went into possession under other leases, and were holding under them when the action was brought.

The case was submitted to the court upon declarations of law, and judgment of possession was given for the sixty-five feet by sixteen-and-a-half feet against Mr. and Mrs. Welsh; but there was no judgment for the back rent, and judgment was rendered in favor of the other defendants. The following declaration of law was asked for the plaintiff and refused:

“If it is believed from the evidence that the plaintiff leased the premises in question by a verbal lease for a term of nine years, and that Mrs. Harney, and afterward Edward Welsh and Mrs. Harney, continued to hold (married or unmarried) and paid rent, then they are held by the condition of the lease; and if rent has not been paid, then the plaintiff is entitled to judgment against them for the amount of rent and for the possession of the premises; and if other persons occupying the property, joined as co-defendants, on demand made do not pay the rent, then plaintiff is entitled to judgment against them for possession.”

The error of this declaration sought from the court is that in supposing a condition of facts which as matter of law would entitle the plaintiff to judgment, material conditions are wanting. The court or jury must also believe from the evidence that demand of the rent has been made of the lessee before there can be a forfeiture; also, as to the third persons in possession of part of the strip of land, that they went in under the lessee, or after possession of the lessee, or that they illegally dispossessed him or her. The lessee is presumed to have taken possession of all the land embraced in the lease unless the contrary is shown, but it is possible she did not. The other defendants might already have been upon the lot, or, from other reasons, she might have been able to obtain possession of only a part, in which case the “persons occupying the property,” named in the statute, would not have such privity of estate as to authorize proceedings against them under the lease.

The court, having refused the declaration asked for, gave the following :

“1. The plaintiff is not entitled to judgment against Catherine Welsh. 2. If said Mrs. Welsh, formerly Mrs. Harney, never took possession of the land let to her east of a line sixty-five feet east of Twenty-first street, and if the defendants (exclusive of Mrs. Welsh) entered upon and held the land east of the line under claim of title, or as lessees of others claiming title adverse to plaintiff's, and that said defendants did not enter or hold by, under, or in collusion with said Mrs. Welsh, then plaintiff is not entitled to recover for any land so held by the defendants east of said line.”

Had the plaintiff asked for payment of rent as well as for possession, this instruction would have been defective and the judgment erroneous in not covering the rent. But he is authorized by the statute (section 38, chapter 189) to bring his action for possession alone, as he seems to have done in this case. But in the declaration, so far as it relates to the defendants who occupied east of the line of Mrs. Welsh, I can see no error. The question of actual possession is a question of fact; what would constitute possession, a question of law. No declaration was asked or given upon the latter point. The court must have found that Mrs. Harney never in fact did take possession of the land east of the sixty-five feet, and in so finding we are bound to presume that it was governed by the law in relation to what constituted possession. It does not necessarily follow, though it is usually true, that possession follows a lease. The lessee may not take possession, and others may enter; or the lease may embrace property in the actual control of others, and if so they cannot be dispossessed by proceedings under the lease.

The judgment is affirmed. The other judges concur.

Quinlivan et al. v. English.

EDWARD QUINLIVAN *et al.*, Appellants, v. EZRA O. ENGLISH,
Respondent.

1. *Partnership settlements — Outgoing partner — Injunction — Receiver.*—Where articles of partnership provided that, in case of the death of any of the partners, violation of any of the articles of the agreement, or other dissolution of the partnership, a general account should be taken, and provided the manner of settlement of the concern and distribution of the assets; and plaintiffs, members of the partnership, sued for an injunction against the other partner, and the appointment of a receiver to settle the partnership affairs: *held*, that plaintiffs had no right to this mode of settlement until the defendant had first had an opportunity of closing up the concern under the articles of partnership. Had they waited until it appeared that the defendant could not or would not comply with the articles before referred to, or until it appeared that the creditors of the firm were not being provided for, and that the property primarily liable for the debts was being wasted or improperly diverted, a right of action would have accrued. But the plaintiffs have no right to assume that defendant would not have done his whole duty if he had had opportunity.
2. *Practice, Civil — Trials — Court sitting as a jury — Instructions — Review.*—Where the statute provides, in a civil action, that the damages shall be assessed by a jury, unless it is waived, the action of the court in such assessment is subject to the incidents of a jury trial, and instructions or declarations of law may be reviewed by the Supreme Court.
3. *Practice, Civil — Trials — Instructions not applicable to question before the court, erroneous.*—Although the proposition embraced in an instruction is correct, yet if it does not affect the question before the court it is erroneous, and should not be given.

Appeal from St. Louis Circuit Court.

The eleventh article of the articles of partnership referred to in the opinion of the court is as follows:

“*Eleventh.*—That in case of the death of any of the said partners, violation of any of the articles of this agreement, or other dissolution of this partnership, a general account of stock shall be taken in writing, as before provided, and the balance due such deceased or outgoing partner or partners ascertained, and such balance paid such outgoing partner, or the representatives of such deceased partner, as follows: one-third of said balance in one month from such dissolution or death, and notes of the continuing partner or partners at one and two years’ time for the other two-thirds; said notes to be secured by deed of trust on the property

Quinlivan et al. v. English.

of said concern, or otherwise, as may be agreed upon, and shall bear interest at the rate of six per cent. per annum; and in case of dispute on account of the valuation of the stock of the said concern, or the fact of the violation of any of the articles of this agreement, the same shall be left to the decision of three arbitrators, one to be chosen by the continuing partner or partners, and the other by the outgoing or offending partner or partners, or the representative of the deceased partner, and the third by these two; and the valuation or decision of the majority of these three shall be final."

The other facts material to the case are stated in the opinion of the court. See, also, same case, 42 Mo. 362.

Hogan, and Dryden & Lindley, for appellants.

I. The damage recoverable for the breach of the condition of an injunction bond is such only as is occasioned by the injunction. (2 Greenl. Ev. p. 253, § 254.) The injunction was merely in aid of the relief sought for by the plaintiffs' suit. And in so far as the injunction was hurtful to the defendant, he is entitled to recover; but in so far as the suit itself was hurtful, it is *damnum absque injuria*. The court, by giving the first half of the first instruction, conceded that the plaintiffs had the lawful right to sue. This much the decision of this court in the case when it was here before compelled the Circuit Court to concede; but thus far and no farther would it go. It refused to declare the legitimate and necessary result of that concession by refusing to declare that no depreciation in value of the partnership property occasioned by the suit was the subject of recovery on the injunction bond. In refusing to discriminate between injury which was the result of the action and that which was the result of the injunction, the court manifestly erred; for the latter the plaintiffs were answerable—for the former they were not.

II. The court erred in refusing the third instruction. After the dissolution of the copartnership the former partners became tenants in common of the partnership property, and none of them can do any act or make any disposition of the partnership funds in any matter inconsistent with the primary duty of them all—of

Quinlivan et al. v. English.

winding up the whole concerns of the partnership. (3 Kent's Com. 63; Sto. on Part. §§ 322, 326.) The idea that one of the former partners may take the partnership property, and use and employ it in his own interests and for his own purposes, is unsupported by any authority; and the restraint of such use by the injunction was no infringement of his rights and no ground of damages. Damages are recoverable only where the party complaining has been deprived of some right. (State, to use of Bradshaw, v. Sherwood *et al.*, 42 Mo. 183.)

III. The right which the law gave to the plaintiffs, to have the partnership property applied primarily to the payment of the partnership debts and liabilities (Sto. on Part. § 97), is not disturbed by the provisions of the eleventh article of the partnership agreement. That article made no provision for debts — did not contemplate a state of indebtedness by the firm. Its office was merely to furnish a rule for the distribution of the distributable property among the partners, and could only operate on the surplus after the payment of the partnership debts.

Mauro & Madill, for respondent.

I. The first instruction was in part given and in part refused. It consists of two distinct propositions, which may be conceded to be correct declarations of law in a proper case for their application. But it will be observed that, while there is testimony warranting the first proposition, there is not a word warranting the second one, or to which it could be applied. As an entire instruction, therefore, it was bad; but as it was susceptible of division without impairing the force or correctness of the first part, it was divided by the court and the first part given. If insisted on as a whole, it must have been rejected. And an examination of the record will show that the second part could not possibly have been warranted by any of the evidence given in the case.

II. The third instruction was properly refused. It is directly in the face of the decision of this court in the case when it was here before. It required the court to declare that on the dissolution of this firm the partners became tenants in common of the

Quinlivan et al. v. English.

partnership property, and that neither of them had the right to use the property for any purpose other than in the settlement of the partnership affairs. But by the articles of copartnership, the defendant being the remaining partner and the plaintiffs the retiring or "outgoing partners," the defendant had the right to retain the property and use it in prosecuting the business in which the firm had been engaged. There was an agreement making ample provision for this precise event, and determining definitely the rights of the parties; and this court has held that, under that agreement, the defendant was entitled to use the property as he was using it when enjoined. (Quinlivan v. English, 42 Mo. 362.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs obtained from the circuit judge an injunction against defendant as partner, and, without hearing, a receiver was appointed, who took charge of the partnership property. Upon hearing in the Circuit Court, the injunction was dissolved and the bill dismissed, whereupon the plaintiffs appealed to this court, and the case was reported in 42 Mo. 362. By reference to the report it will be seen that the action of the Circuit Court in dissolving the injunction was fully sustained, the court holding that there was no cause whatever for granting it, and that defendant had a right, under the articles of partnership, to the possession of the property, and to continue the business upon the terms and conditions named in the articles. But the court was of opinion that the bill should have been retained for the purposes of an account, and that the defendant should be permitted to take the property at a valuation, if he should so choose; otherwise, that it be sold and accounted for by the receiver.

After the case came again into the Circuit Court, the defendant declined to take the property, whereupon it was sold, and the damages arising from the injunction were assessed against the obligors of the injunction, according to the provisions of sections 13, 14, and 15 of chapter 167 of the General Statutes. The plaintiffs complain that the damages were excessive, and again bring the case to this court, and ask us to review the assess-

Quinlivan et al. v. English.

ment. The sections of the statute referred to require that the damages shall be assessed by a jury unless it is waived; hence the action of the court in such assessment is subject to the incidents of jury trial, and instructions or declarations of law may be reviewed by us.

The assessment of damages being submitted to the court, the plaintiffs asked for the following declaration of law:

[“1. Although the plaintiffs were not entitled to an injunction in this case, yet they have the lawful right to sue and maintain this action against the defendant for the settlement of the partnership accounts of the firm of English & Quinlivan, and to subject the partnership property to the payment of the partnership debts]; and any depreciation in value of the partnership property pending the suit, which was the natural result of the suit and of the delays of the law, and not the result of the injunction upon the defendant, ought not to be taken into consideration in estimating the defendant's damages on the injunction bond.”

The court gave so much of the declaration as is embraced within the brackets, and refused to give the rest, though I can not understand the reason that governed its action. The proposition embraced in the brackets might be a correct one; yet, if it was not to affect the question of damages, the defendant was not entitled to it. If it had any such bearing, then its application, as given in that part of the declaration refused, should clearly have been made. The whole declaration contains practically but a single proposition, and seeks to distinguish between the damages resulting from the injunction and dispossession of defendant and such as would have resulted from the suit had there been no injunction and had the eleventh article of the partnership contract been observed by the plaintiffs.

I have scrutinized so much of the evidence presented in the bill of exceptions as bears upon this question, and I see no evidence whatever of any damage that did not result from the injunction and appointment of the receiver. The defendant did not have possession of the property for a day after such appointment. The receiver took possession of the property at the request of the plaintiffs, and finally, after the case had been

Quinlivan et al. v. English.

once passed upon by this court, sold the whole property. It is impossible to tell whether or not, if the plaintiffs had respected the rights of the defendant under his contract, and it had become necessary for them to interfere to seek an account and application of the property to the payment of the debts, any damage would have arisen; certainly none of which the defendant could complain. The whole declaration, then, instead of a part, should have been refused, for irrelevancy.

The following declaration was also asked and refused:

"3. That the defendant and the plaintiffs, on the dissolution of the copartnership, became and were tenants in common of the copartnership property, and, until the partnership debts were paid, neither had any right or authority in law to use or employ said property for any other purpose than for the settlement of the partnership affairs; and the deprivation of the defendant's use of said property in the carrying on of the business of a brewer, by means of the principal suit between these parties, ought not to be considered by the court in estimating the defendant's damages on the injunction bond."

This declaration would be well enough, perhaps, in a proper case, but it has no application to the one at bar. The plaintiffs seem to have misapprehended the decision of the court in 42 Mo. 362, and the declarations of law asked by them would imply that the court then decided that the suit for an account and settlement was properly brought at the time, and that the only mistake was in obtaining the injunction. But the court decided nothing of the kind. The injunction and settlement by a receiver was all that was sought by the action. The plaintiffs had no right to this mode of settlement until the defendant had first had an opportunity of closing up the concern under article eleventh of the partnership contract. This opportunity was denied him by taking the property out of his hands, which was all wrong. But the court say that the bill should not hence be dismissed, leaving the property in the receiver's hands, but that the defendant still has a right to possession if he chooses to take it, notwithstanding he has been kept out so long, and that it should be restored to him upon a valuation. The court did not decide that

Rebetto v. How.

the plaintiffs had a right of suit of any kind when this was commenced, but only that a general dismissal was not the proper way to dispose of it; that the defendant might still, if he chose, avail himself of his contract, so far as was yet in his power; and if he did not so choose, that the receiver, although improperly appointed, should, notwithstanding, be required to close out the concern. The Circuit Court conformed its subsequent action to this opinion, and proceeded further to ascertain the damages suffered by the defendant from the plaintiffs' proceedings. There is no "principal suit," as spoken of in the declaration asked by plaintiffs, except the proceeding at bar, and by that alone is the defendant damaged.

Had the plaintiffs waited until it appeared that the defendant would not or could not comply with the requirements of article eleventh before referred to, either by his not taking a general account of stock or not paying and securing the plaintiffs as therein provided, or until it appeared that the creditors of the firm were not being provided for, and that the property, primarily liable for their debts, was being wasted or improperly diverted, a right of action would have accrued. But the plaintiffs had no right to assume that the defendant would not have done his whole duty if he had had opportunity; nor could a distinction be made by the court between the suit actually brought and an imaginary one.

Judgment affirmed. The other judges concur.

ANTHONY F. REBETTO, Appellant, v. JOHN HOW, Respondent.

1. *Boats and vessels — Seamen — Wages — Forfeiture — Entirety of contract — Variance.*—If a seaman enters into an engagement for a specified voyage, and the boat or vessel is disabled before reaching the port of delivery, and another vessel is chartered or substituted in its stead, it is his duty to proceed on such substituted vessel. But where there is no substitution, but the freight is simply transhipped to another vessel bound for the same destination, it is unjust and unreasonable to say that the crew can be forced to go and serve on the boat which takes the freight from the one disabled, or else forfeit their whole pay.

Appeal from St. Louis Circuit Court.

The facts as agreed between the parties are set out in the opinion of the court.

Bakewell & Farish, for appellant.

Appellant was hired by respondent for a definite voyage, on monthly wages. At the time the vessel in which he had shipped became unseaworthy, the appellant had served one month. It is for this month's wages that this action is brought.

This was not a case where a new vessel was substituted for the one upon which the appellant had shipped, but the freight was simply transferred to another vessel proceeding in the same direction, officered and manned by a distinct master and crew. A case of substitution is where a new vessel is procured, and the crew, officers, and freight are transferred. There is no law making it a desertion or abandonment on the part of the seaman to refuse to proceed and complete the voyage on the substituted vessel. Nor is there any force in the reasoning that because it is the duty of the master under certain circumstances, in case of accident to his vessel, to reship on some new bottom, therefore the seaman is bound to follow the freight in the new vessel. This, if true at all, can only apply when, from the necessity of the case, the services of the seaman are requisite to forward the freight, and no other means can be procured. In the case at bar no such state of facts is shown. The boat on which the goods were transhipped was proceeding in the same direction, and must, the contrary not appearing, be presumed to be officered and manned. But if this were otherwise, and this was a case of substitution of one vessel for another, there is no reason why the appellant may not recover for his month's wages that had accrued. (*Hindman v. Shaw*, 2 Pet. Adm. Dec. 264.) The maxim that "freight is the mother of wages" has no application to this case; for here freight was earned—the vessel had completed a very large portion of the voyage. (*Curtis on Merch. Seamen*, 271.)

Rankin & Hayden, for respondent.

Where a mariner ships for a specified voyage, and the ship is disabled on that voyage and before reaching her point of destination, the mariner is bound to prosecute the voyage in a suitable vessel, to which the cargo has necessarily been transferred in order to convey it to the port to which the master had contracted to take it. In *Hindman v. Shaw*, 2 Pet. Adm. 264, the vessel had arrived at a port of destination, and had earned some freight, and the mariner had thus become entitled to some wages. In the present case the vessel was disabled long before she reached Fort Benton, her port of destination. She had accordingly earned no freight; and thus the question is presented in its simple form. The principle of the case in *Peters* thoroughly covers the present case. The mariner was considered to have deserted his vessel, and was denied any wages for what corresponds to the whole voyage in the case at bar.

Pothier and Valin have decided this question against the mariner. (Curtis on Merch. Seamen, p. 18, n. 1.) All the analogies of law are in favor of the view taken by the court below. The American doctrine is not only that the master *may*, but that he *must*, forward the cargo, if possible, in another bottom, where his own ship can not proceed. (1 Pars. on Mar. Law, 161, note, and authorities there cited; *Dorris v. Copelin*, 14 Am. Law. Reg. 493.) *Lex uno ore omnes alloquitur*. It would be grossly inconsistent in the law to say in one breath to the master, "You must reship your cargo in another vessel, if you can possibly procure one," and in the next breath to the mariner, "You are under no obligation to serve in any other vessel than the one you shipped on."

"Freight is the mother of wages." As no freight is earned unless the cargo is carried to its destination, the mariner certainly would be entitled to no wages when he refused to perform the service by which alone wages could be earned. Unless the voyage is an entire voyage, no freight is earned, and consequently no wages, even though unavoidable accident prevent the completion of the voyage. (*The Lady Durham*, 3 Hagg. Adm. 196; *Her-*

Rebetto v. How.

naman v. Bawden, 3 Burr. 1844; Giles v. The Brig Cynthia, 1 Pet. Adm. 803; The Saratoga, 2 Gall. 164.)

The identity of the vessel in which the mariner serves is not the essence of his contract. It is the identity of the voyage, as a voyage, that is essential; for the object and purpose is the transportation of the cargo to its destination. This can be completed only through the mariner. To allow him to cling to his vessel and frustrate the object of the whole voyage would be an absurdity.

WAGNER, Judge, delivered the opinion of the court.

This suit was originally instituted before a justice of the peace, where the plaintiff had a judgment. On appeal to the Circuit Court the judgment was reversed and the court found for the defendant. The case was tried on the following agreed statement of facts:

That the defendant was, in May, 1867, and before and since, the owner of the steamboat David Watts; that in the latter part of March, 1867, the plaintiff applied on board said boat, then lying at the port of St. Louis, and was engaged and hired by said defendant, as a hand on said boat, to make the trip from St. Louis to Fort Benton and back, and was to receive and be paid by defendant \$40 per month, and thereupon plaintiff shipped on board of said boat; that said boat left St. Louis on or about the 30th day of March, 1867, and proceeded on her way until she arrived at Plattsmouth, where the boat, from one of the accidents of navigation, was unable further to pursue her voyage; that thereupon said boat turned back and proceeded down the Missouri river to a point fifteen miles below St. Joseph, where she met the steamboat Tacony; that thereupon, it being impossible to make the David Watts seaworthy for her voyage, her cargo was transferred to the steamboat Tacony, and the plaintiff and other hands requested to resume the voyage on the Tacony. This the plaintiff refused to do, claiming that he was not bound to serve on another boat. This was the first day of May, 1867. It is admitted that the plaintiff performed his work well, and that he has not been paid anything; that the Tacony was as good a boat as the Watts,

and suitable for the voyage. The suit was brought for one month's wages. It is contended, on the part of the defendant, that the plaintiff, in refusing to ship on board of the *Tacony*, was guilty of desertion, and thereby forfeited all claim to wages, and that, as the voyage was not completed when he left the boat, nothing had been earned, according to the doctrine that "freight is the mother of wages." In investigating this subject I have been surprised at the great dearth of authority. So far as my researches have extended, there is no reported case arising out of the navigation of our inland waters. In maritime practice the general rule applies that it is necessary to earn freight in order to obtain wages; but there are qualifications and exceptions to the rule, and it is questionable how far the doctrine would be enforced as to our steamboat navigation, where hands are employed for specific periods, without regard to any particular trip or voyage. Seamen are the favorites or wards of the courts, and it is an established principle that contracts respecting their wages will be construed liberally in their favor, in all cases where there may be room for such construction. (1 Pars. Cont., 5th ed., 391.)

The general doctrine that, where the voyage is interrupted before the goods reach their final point of destination, it is the duty of the master to provide other means of conveyance, and forward and transport them to the destined port, sheds very little light on the question at bar. If a new vessel were chartered, and the freight, master, and crew transferred to it, there would seem to be substantial reasons why the hands should be compelled to make the trip on the substituted vessel. But where there is not a substitution of vessels, but a transference of freight only, the obligation cannot prevail to the same extent.

In *Hindman v. Shaw* (2 Pet. Adm. Dec. 264), a ship, after reaching one port of delivery, was unable to further proceed from a port at which she touched in the progress of her voyage. The seamen refused to proceed in a vessel provided for the further transportation of the cargo, and claimed wages and an additional allowance, it being the custom in the admiralty courts, when the voyage was interrupted by accident or unseaworthiness of the

Rebetto v. How.

vessel, to make an allowance to the seaman to pay his expenses home and loss of time. His right to wages up to the first port was conceded, and his claim for additional wages and allowance was the only matter in dispute. The court refused the additional allowance on the ground that the seaman was offered a renewal of his contract, and that there was no equity in his demand. Did the plaintiff here claim for the whole voyage to Fort Benton, or for any time further than for actual services rendered, it is clear that he could not succeed. But he only asks for pay while he performed services. His contract was to go on the David Watts, and with the master, officers, and crew provided for that boat. He might have been very willing to ship on the Watts, knowing the men with whom he would be associated, but wholly unwilling to go on another boat differently situated. When the freight was transhipped on the Tacony, and new officers were to be placed over him, and he was to be surrounded by a strange and different crew, the circumstances were materially changed, and he had a right to say "I did not enter into this contract." If a seaman enters into an engagement for a specified voyage, and the boat or vessel is disabled before reaching the port of delivery, and another boat or vessel is chartered or substituted in its stead, it is his duty to proceed on such substituted vessel. But in this case there was no substitution; the freight was simply transhipped or transferred to another boat bound for the same destination. Where one of our river boats starts on a trip and becomes disabled, and another boat comes along and receives her freight for a destined port, it is unjust and unreasonable to say that the crew of the former can be forced to go and serve on the latter, else they will forfeit their whole pay.

I think the judgment of the Circuit Court was erroneous, and it should be reversed, and judgment will be entered in this court for plaintiff. The other judges concur.

JOHN MORTLAND, Respondent, v. HORACE HOLTON and FRANK L. CAPELLE, Appellants.

1. *Practice, Civil—Pleadings—Offset—Debt due to one of two defendants sued on joint contract—Sureties.*—It has been long settled in this State that where suit is brought against several defendants on a contract executed by them jointly, a debt due from plaintiff to one of the defendants can be offset to the claim sued on. By the statutes of Missouri, contracts which by the common law are joint only are construed to be joint and several; and, by the practice act, judgment may be given for or against one of the parties, plaintiffs or defendants. These provisions so change the relations of parties that the authorities which forbid an offset of a debt due one of several defendants can have no force here; and even if this right of offset were not in general conceded, it certainly must be when the defendant who seeks to make it is the principal and his co-defendant is his security.
2. *Practice, Civil—Pleadings—Reply where one defendant pleads a several debt in offset.*—Where in a suit against several defendants one of them is permitted to offset the demand of plaintiff by a debt due to himself separately: *held*, that by way of reply to such offset plaintiff might set up a debt additional to the one sued on, due by this separate defendant to himself. This individual claim of the plaintiff, however, should not be permitted to extinguish any part of such separate defendant's offset intended to be or proper to be applied upon the debt growing out of the contract which formed the basis of plaintiff's demand, either by agreement or connection with the subject matter of the contract.
3. *Practice, Civil—Pleadings—Answer—Reply—Counter claim—New matter.*—A debt owing to plaintiff by one of several defendants, who puts in a separate claim against the plaintiff, is, in one sense, an "answer at law" to that claim. It shows a state of facts existing at the time the separate claim is put in—a mutual indebtedness, an unadjusted account—that renders it unjust to permit one party to bring in his side of the account and shut the other out. It need not be called a counter claim; it lacks one of its elements, as the plaintiff should not be permitted to recover a judgment upon it; but it is new matter, that shows that defendant should not be permitted to recover so much of his account as equals this claim.
4. *Practice, Civil—Reply setting up additional debt of a separate defendant who has set up a separate offset, not a departure.*—A reply setting up a debt or claim of plaintiff, in addition to the joint claim sued on, against a several defendant, who has set up a several demand against plaintiff as an offset, is not a departure. A departure is an abandonment of the original cause of action or defense for another. Such a reply sets up no new cause of action; it only bars a defense.
5. *Practice, Civil—Pleadings—Departure, when objected to.*—A departure must be objected to before verdict; a verdict in favor of him who makes a departure cures the fault, if the matter is in substance a sufficient answer to what is before pleaded by the adverse party.

Mortland v. Holton et al.

6. *Practice, Civil—Appeal—Errors not appearing on the record or saved by exceptions not considered.*—The Supreme Court, upon issues triable by jury, uniformly declines to consider errors not appearing upon its record proper—*i. e.*, the pleadings, process, motions, orders, verdicts, and judgments—unless saved by proper exceptions.

Appeal from St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

Peacock & Cornwell, for appellants.

I. Plaintiff can not sue on one cause of action, and, when a counter claim or set-off is pleaded, set up another cause of action in his reply as a set-off or counter claim to the matter pleaded by defendant as such. Section 3, Gen. Stat. 1865, p. 658, prescribes what the petition shall contain, ending as follows: "If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded." The answer contains denials or new matter constituting a counter claim. (Gen. Stat. 659, § 12.) Two or more defendants making the same defense shall answer jointly. "If the answer contain new matter, and the plaintiff fail to reply thereto," etc., "the defendant shall have judgment." (*Id.* § 16.) "The reply shall be governed by the rules relating to answers." This can not mean, certainly, that because a counter claim may be set up in answer the same might be done in a reply; for, should this be the case, a judgment might be rendered upon the claim set up in such reply, for if the rule above referred to governs in one instance, it must in the other, the logical consequence follows.

The object of permitting a counter claim to be set up in answer is to avoid a multiplicity of suits, and the presumption is that the plaintiff has incorporated in his petition all his causes of action that are consistent and permitted under the rules of pleading. (Gen. Stat. 1865, p. 657, § 2.) To this the defendant may plead and set up such causes of action against plaintiff as he has, and there the matter rests; being admitted or denied by a reply, plaintiff can only recover on the cause of action set up in his petition. (17 Mo. 585.) Any other view than the above

Mortland v. Holton et al.

would be a departure from the cause of action and matter set up as the basis of suit. The summons is to answer the complaint of plaintiff as filed—not a new and different cause of action to be set up in a reply.

II. The petition only claims for hire of the boat in going from St. Louis to Keokuk and returning to St. Louis. The court below, having permitted the charter party to be read for the purpose of sustaining plaintiff's cause of action mentioned in his petition, considered it as evidence not only of the trip from St. Louis to Keokuk and back to St. Louis, but also of a subsequent trip from St. Louis to Memphis and back. The first trip, and that is all that is sued for in the petition, took only twelve days at the farthest, while the subsequent trip took from twenty to twenty-two days—the two trips together taking, with detentions and all, thirty-five days.

III. A mere surety had a right to avail himself of all matters taken into consideration at the settlement; and, as against him, no other claim against his co-defendant could be set up in the reply (even admitting that such reply could be made) which would go to reduce the amount of the set-off in his favor.

Krum, Decker & Krum, for respondent.

I. No exceptions are saved by the appellants to the admission of any testimony by respondent, nor are any instructions prayed. There is nothing here on the record of which appellants can complain.

II. The respondent Capelle had full benefit of his counter claims, which, however, even if proved, were offset by the plaintiff's reply.

III. Plaintiff's demand for charter money due on the *Adelia* was a joint claim against both defendants. Several of the counter claims pleaded by defendants were separate demands in favor of only one of the defendants (Capelle); and to these plaintiff could certainly offset a debt due by Capelle to himself. One defendant is allowed, under our statute, to offset a claim due to himself, to show that plaintiff ought not to recover a judgment against him; and the plaintiff should certainly be permitted to

prove any facts to show that defendant should not, by reason of his separate set-off, be discharged of his joint liability. Where a debtor is in a position of being as to one debt a joint debtor, and as to another debt sole debtor, to the same creditor, it is not for him to elect which of the demands he will satisfy by set-off. The court will apply such set-off to that part of the liability of the defendant which can not be reached by judgment in the case.

IV. Plaintiff could not, in his petition, have united the claim against Capelle alone with his claim against Holton and Capelle jointly. But when defendants seek to avail themselves of a claim due by Holton to Capelle individually as a set-off, then plaintiff may plead and show that such separate counter claim ought not to be allowed to prevail, for the reason that there is another debt to which the set-off ought equitably to be applied. (Kent v. Rogers, 24 Mo. 306.)

BLISS, Judge, delivered the opinion of the court.

The defendants, by written contract executed jointly, chartered the steamboat "Adelia" for a trip from the port of St. Louis, as charged in the petition, to Keokuk and return, at sixty dollars per day; and the petition alleges that it remained so chartered for thirty-five days, and asks for a judgment of \$2,100 and interest. Defendants answered that Holton was surety for Capelle, and set up various offsets by way of counter claim, amounting in all to more than the plaintiff's demand. Most of these counter claims were individual demands against the plaintiff by defendant Capelle, and were so set forth.

In reply the plaintiff admitted or denied each one, and against those claimed as due Capelle alone he sets up a demand as an offset not embraced in the petition, to-wit: some \$400 due him for the use of a barge previous to the charter of the boat. The record thus presents two questions: whether in this suit a debt due one of the defendants can be offset to the claim sued on, and, if so, whether that debt can be offset by a counter claim of the plaintiff against him alone.

The first of these questions has been long settled in Missouri, and in favor of the right of one of the several defendants to offset an individual claim against the plaintiff. (*Austin v. Freeland*, 8 Mo. 309; *Kent v. Rodgers & Dillon*, 24 Mo. 306.) By our statutes, contracts by the common law joint only are construed to be joint and several, and survive against the heir and personal representative of the obligor; and, by the practice act, judgment may be given for or against one or more of the several parties, plaintiffs or defendants; and if a plaintiff have a cause of action against several, upon which he is entitled to but one satisfaction, he may sue one or more. These provisions so change the relations of parties that the authorities which forbid an offset of a debt due one of several defendants have no force here; and even if this right of offset were not in general conceded, it certainly must be where the defendant who seeks to make it is the principal and his co-defendant is his security.

If one defendant may so offset his individual claim, it would seem that the plaintiff ought to be permitted to set up against it any debt such defendant may be owing him. One proposition ought to follow the other, and such offset must be permitted, unless forbidden by the statute. Section 12, chapter 165, General Statutes 1865, says that "the answer of defendant shall contain * * a statement of any new matter constituting a defense or counter claim," etc., while section 15 authorizes the plaintiff in reply to allege any new matter not inconsistent, etc., "constituting an answer in law" to the new matter of defendant. Thus the statute expressly authorizes the defendant to make a counter claim, but does not so authorize the plaintiff in his reply. This subject has undergone discussion in New York and other States, but cannot be considered as settled. The language of the New York and Ohio codes is the same as was ours before the revision of 1865. The plaintiff is authorized to allege in the reply new matter consistent with the petition, "constituting a defense to the new matter in the answer." Voorhees, in commenting on the New York code (p. 353), expresses an opinion adverse to the right of counter claim in the plaintiff; and so does Nash, in his *Ohio Practice* (p. 95). Tiffany & Smith, in their

Mortland v. Holton et al.

New York Practice (vol. 1, pp. 389-90), seem to admit the right, where the matter would not be a departure, but treat it as doubtful and unsettled. There are New York judicial opinions apparently both ways. Where the subject matter of a counter claim set up in the plaintiff's reply existed at the commencement of the suit against all the defendants, and was of such a character as could have been joined with the cause of action contained in his petition, it is not probable he would be permitted to use it as a reply. And a strict construction of the term "constituting an answer at law," now used in our code in reference to the reply, might confine the plaintiff to an allegation of some fact that shows that the demand never did exist, or has ceased to exist, as a lawful claim. Thus he might, in replying to the counter claim of defendant, set up fraud, duress, payment, etc. But a more liberal and just construction in a case like the present would authorize an offset as well, although no express authority is given the plaintiff to set up new matter by way of counter claim. In one sense a debt owing by one of several defendants, who puts in a separate claim against the plaintiff, is an "answer at law" to that claim. It shows a state of facts existing at the time the separate claim is put in—a mutual indebtedness, an unadjusted account—that renders it unjust to permit one party to bring in his side of the account and shut the other out. It need not be called a counter claim; it lacks one of its elements, as the plaintiff should not be permitted to recover a judgment upon it; but it is new matter, that shows that the defendant should not be permitted to recover so much of his account as equals this claim. The demand of the plaintiff to have his claim against the defendant considered comes with special force in view of the insolvency of Capelle, and under the old practice might present such an equity as to sustain a bill in chancery for an offset. I feel no hesitation in holding, in the present case, that if defendant Capelle is permitted to set off his individual demand against the joint claim sued on, the plaintiff should also be permitted to lessen that demand by offsetting any individual claim he may have against Capelle. This individual claim of the plaintiff should not, however, be permitted to extin-

Mortland v. Holton et al.

guish any part of Capelle's offset intended to be or proper to be applied upon the rent of the steamboat, either by agreement or by its connection with its charter and use. Defendant Holton had a right to insist that every such item of Capelle's offset should be so applied.

Defendants claim that this new account of plaintiff is a departure. Not at all. A departure is an abandonment of the original cause of action or defense for another. (1 Chit. Pl. 644; Gould's Pl. ch. 8, § 65.) It sets up no new cause of action; it only bars a defense. And even if it were a departure, it is too late to complain of it. It was not objected to before verdict, and "a verdict in favor of him who makes a departure cures the fault, if the matter so pleaded is in substance a sufficient answer to what is before pleaded by the adverse party." (Gould's Pl. ch. 8, § 79.)

The other objections to the action of the Circuit Court do not appear upon the record, and are not properly saved. The testimony, it is true, is spread out by the bill of exceptions, but no exceptions were taken to the various alleged erroneous proceedings as they were had. For instance, it is insisted that the trip to Keokuk, for which the boat was chartered, as the petition alleges, did not consume the thirty-five days, but that a trip was taken to Memphis during the time. But how do we know that? The pleadings do not show it, nor does it appear in any other part of the record proper. If defendants were unwilling, under the pleadings, that the court should include in its finding the rent for their trip to Memphis, they should have made it known on the trial, that the plaintiff might have amended his petition if necessary. But no objection was then made, and no exceptions were taken, nor was any declaration of law asked upon this or any other matter. This court, upon issues triable by jury, uniformly declines to consider errors not appearing upon the record proper—*i. e.*, in the pleadings, process, orders, verdicts, and judgments—unless saved by proper exceptions. (Bateson v. Clark, 37 Mo. 31, and other cases.)

Let the judgment be affirmed. The other judges concur.

Kinner v. Walsh, Garnishee of Held.

HUGO KINNER, Defendant in Error, v. JAMES B. WALSH,
Garnishee of HENRY HELD, Plaintiff in Error.

1. *Husband and wife—Deed of trust of wife's separate property to secure debts of the husband—Liability of surplus in the hands of the trustee after sale for debts of the husband.*—Where a married woman, jointly with her husband, conveys her separate real estate by deed of trust to secure a certain debt of her husband, and the deed provided that if the property should be sold under the deed the proceeds should be applied to the payment of the debt, and the remainder, if any, should be paid to the parties of the first part—the husband and wife—or their legal representatives: *held*, that this remainder should be returned to the party of whose property it was the proceeds, and that by the provision of the deed it belongs to the wife alone.
2. *Husband and wife—Deed of trust of separate real estate of wife to secure debts of the husband—Equity of redemption, to whom it descends—Surplus.*—Where a married woman, jointly with her husband, conveys her separate real estate to secure debts of her husband, and dies before sale under the deed, the equity of redemption descends to her heirs; and upon her death their right of property becomes complete, subject only to the trust deed and to the curtesy of the husband. That descent carries with it the right to any surplus arising from the sale of the property after paying the debt secured by the deed.
3. *Husband and wife—Debts of husband contracted during coverture—Property of wife not derived from her husband—Presumptions.*—The law authorizes no general presumption that the debts of the husband contracted during marriage were for the joint benefit of the husband and wife, and, if it did, it could not apply to the property of the wife held before coverture. Nothing is to be presumed against the separate estate of the wife, not derived from the husband, that does not arise from her deed.

Error to St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

J. A. Beal, for plaintiff in error.

I. The surplus left after satisfaction of the deed of trust belonged to the heirs of Anna Held, and could not be seized by attachment or execution against Henry Held to pay the debt of Henry Held. These lots belonged to Anna Held before her marriage with Henry Held. By section 14, p. 464, of General Statutes of 1865, the rents, issues, and products of the real estate of a married woman, and the interest of the husband in the prop-

Kinner v. Walsh, Garnishee of Held.

erty of Anna Held which she owned before marriage, are "exempt from attachment or levy of execution for the sole debts of the husband." This section also exempts from attachment and execution "all moneys and obligations arising from the sale of such real estate" owned by the wife. The money attempted to be garnisheed on execution arose from the sale of Anna Held's real estate, and the debt was not her debt.

II. The allowing a plaintiff in execution to summon a party as garnishee of defendant in execution contemplates the garnishee being a debtor of the defendant. (8 Mo. 322.) J. B. Walsh did not owe Henry Held a debt. He was trustee, vested with the legal title of Mrs. Held's property, affected with a trust for her heirs.

III. On the death of Anna Held a descent was cast, and her real estate descended to the heirs at law, to-wit: her children; and the sale of the property after her death vested in her children the surplus proceeds of whatever was left. The same rules apply as in the case of a mortgage. (2 Washb. Real Prop. pp. 152, 545, ed. 1868.)

IV. A question might arise whether the husband was entitled to curtesy in the surplus proceeds; if so, how is a creditor of Henry Held to get the curtesy in money? On judgment against Welsh it is an absolute recovery; there is nothing to show that, on the death of Henry Held, Kinner, the plaintiff in the execution, holds the money or remainder for the children of Anna Held. Before Henry Held could get the money for his curtesy, he would be compelled to give security to refund it to the heirs of Anna Held on his death; otherwise, the curtesy would be an absolute estate and ownership of the money, but to be returned on his death. It would be more than usufruct—it would be a total consumption of the money, and the heirs would not be able to reach the money. Curtesy in real estate is the usufruct of the land during the life of the husband; and on his death the land reverts to the heirs or legal owners. In garnishment, the curtesy can not give the money to Kinner and require him to refund it at his death. How are the children of Mrs. Held to get the money after the death of Henry Held? (23 Penn. 231.)

Kinner v. Walsh, Garnishee of Held.

Woerner & Kehr, for defendant in error.

I. The debt secured by the deed of trust, having been contracted during marriage, must be presumed to have been contracted for the joint benefit of husband and wife; and it matters not that the notes were signed by the husband alone, for, if signed by the wife, the act on her part would have been nugatory. In *Phelps v. Tappan*, 18 Mo. 394, it is held that property purchased by the husband during marriage is liable for the debts of the wife contracted before marriage, because it is presumed to be "the fruit of the joint industry of husband and wife." The debt on which the garnishment was founded was likewise contracted during marriage; hence, for the joint benefit of husband and wife.

II. Section 14, chapter 115, Gen. Stat. 1865, p. 464, has no application to this case, because the section exempts the rents, issues, and products only during coverture. Here coverture has ceased by the death of the wife.

III. The surplus realized belongs to Held absolutely. After the sale the trustee has a surplus in his hands, which the deed of trust directs him to pay "to Henry Held and Anna Held, his wife, or their legal representatives." Who is entitled to this money? If the interest of Anna Held in the money be regarded as a chattel real, then, the husband having survived the wife, "the law gives him her chattel real, absolutely by survivorship; for he was in possession of the chattel real during coverture by a kind of joint tenancy with the wife." (2 Kent's Com. 135.) If the right to the money be regarded as a chose in action, which had its inception during the marriage, it undoubtedly passes to the husband, who survives, and may be recovered at the suit of any creditor. (*Hockaday v. Sallee's Garn.*, 26 Mo. 220.) The sale under the deed of trust is a conversion of the realty, and the surplus is personal property. (*Leigh & Dalzell on Eq. Conv.* pp. 47, 128, 143.) •

BLISS, Judge, delivered the opinion of the court.

On the 18th of September, 1865, Henry Held and Anna, his wife, conveyed to Walsh, the garnishee, three separate parcels of

Kinner v. Walsh, Garnishee of Held.

land in trust to secure certain indebtedness of Henry Held named in the deed. The agreed statement of facts shows that Anna Held, when the deed was executed, owned in her own right more than half of the land. The deed provided that in the event of a sale to satisfy the debt, the surplus, after its payment, etc., shall be paid to the grantors of the deed or their legal representatives. Anna Held died March 15, 1867, leaving two children. Some of the notes of Henry Held, secured by the deed of trust, maturing, Walsh, the trustee, on the 4th of March, 1868, sold the property, paid up all the notes, the costs, expenses, etc., amounting to \$2,969.30, and a surplus of \$620.70 remained in his hands.

To reach that surplus, and subject it to the payment of another debt of Henry Held, the plaintiff (Kinner) instituted the present proceedings in garnishment against Walsh, who replies to the interrogatories, setting forth the facts as above stated, and claiming that he holds the money in trust for the estate of Anna Held. The Circuit Court rendered judgment against the garnishee for the amount of plaintiff's debt, and the case is brought up by writ of error.

It is unnecessary, in our view of the principal question involved in this record, to pass upon the right of the plaintiff to garnishee a trust fund in the hands of the trustee. The more important question arises out of the relation of Mrs. Held and her heirs to the fund. In any proceeding, whether by garnishment or otherwise, can this money be subjected to the debts of the husband? The original debt, to secure which the trust deed was executed, was his alone. The notes were not her contracts, nor does it appear that she was in any manner interested in them or in anything connected with them. For the aid, alone, of her husband, she conveyed her property in trust in the nature of a mortgage to secure his debts. The debts are unprovided for; the property is sold. More than half of the proceeds of the sale of what was exclusively hers is applied upon these debts, and a balance remains in the hands of the trustee. Does that money belong to the wife and her representatives or to the husband and his? If by any lawful contract she has parted with her interest and given it to him, then his creditors, in the proper way, may come in and

Kinner v. Walsh, Garnishee of Held.

appropriate it. But the only instrument affecting the question is the trust deed. Through that she lost most of the property embraced in it, but the object of the trust is accomplished and a residue remains. What is the effect of the trust deed upon that residue?

If the terms of the deed are to control in its fair interpretation, it can have no effect to divest the fund from its natural course. On the other hand, by an express provision for the distribution of the fund, it belongs to her alone; for the deed provides that if the property shall be sold, the proceeds shall be appropriated to the payment of the notes, etc., "and the remainder, if any, shall be paid to the said parties of the first part," Mr. and Mrs. Held, "or their legal representatives." There is only one just construction that can be given to this language, and that is that this remainder should be returned to the party of whose property it was the proceeds—the party whom the equities of the case point out as entitled to it. The relation of husband and wife has nothing to do with the question. His curtesy cuts no figure in this case. In conveying the property to secure his debts, she stands as a stranger, and all the difference there is is in her favor; for, while a stranger can make any kind of a contract with him, she could only act by the deed. The deed not designating which of the said parties should receive this surplus, it clearly belongs to her, for out of her land it was made. But disregard this reservation, and the result is the same.

Anna Held died about a year before the sale. The equity of redemption descended to her heirs, and their right to the property became complete, subject only to the trust deed and to the curtesy of her husband. That descent carried with it the right to any surplus arising from the sale of the property, after paying the debt. There is no difference in this respect between a common mortgage or a mortgage with power to sell, and a trust in the nature of a mortgage with power to sell. They are all alike redeemable, and are all given for the same end. (Washb. Real Prop., book 1, chap. 16, § 5; *Bourne v. Bourne*, 2 Hare, 35; *Shaw v. Headley*, 8 Blackf. 165; *Moses v. Murgatroyd*, 1 Johns. Ch. 130; *Wright v. Rose*, 2 Sim. & Stu. 323; 1 Hill. on Mort.

Kinner v. Walsh, Garnishee of Held.

chap. 14, § 28.) It is of no importance, so far as this case is concerned, to consider the effect of the provision in the deed reserving the surplus to her "legal representatives;" for, whether it go to the heir or administrator, it is equally exempt from attachment or any other proceeding to subject it to the husband's debts. This is not a proceeding against the curtesy of the husband, if he have any in the little left after paying his debts, and the rights of his creditors in that respect need not be considered.

We are referred to section 14, chap. 115, of General Statutes. This section exempts, among other things, all moneys and obligations arising from the sale of the wife's real estate from attachment or levy during coverture for the sole debts of the husband, and is a very just provision. But it does not control the case, as it applies only to attachments, etc., "during coverture," and not after the wife's decease. The section furnishes a necessary safeguard for the real estate of the wife and the proceeds of its sale, securing her in its enjoyment and against loss from her husband's debts. The provision does not apply to such estate and proceeds after her decease, nor is it needed, inasmuch as the fact of her death passes beyond his control and the reach of his creditors the property thus protected during her life.

I know not on what principle counsel base their claim that the debts of the husband contracted during marriage must be presumed to have been for the joint benefit of husband and wife. The law makes no such general presumption, and if it did it could not apply to the property of the wife held before coverture. Upon proof of fraud, an estate of the wife derived from the husband might under some circumstances be reached by his creditors; and certain presumptions, so far as the term applies to reasonable inferences, may arise from those circumstances. But nothing is presumed against the separate estate of the wife, not derived from the husband, that does not arise from her deed.

The judgment is reversed. The other judges concur.

THE SOUTHWESTERN FREIGHT AND COTTON PRESS COMPANY,
Appellant, v. E. O. STANARD, Respondent.

1. *Contracts—Sales—Custom merchant, how established; when binding—Evidence.*—A custom, to be good, must be general, uniform, and notorious, and, to be binding on the parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed; and evidence which does not tend to establish any open, uniform, and notorious rule, but simply consists of the declarations of witnesses as to what their individual opinions are, and the obligations they should have deemed resting upon them in certain circumstances, is illegal, and should be excluded.
2. *Contracts—Established custom, evidence of, for what purpose admissible; force of.*—Where a contract is made as to a matter about which there is a well-established custom, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all the particulars which are not expressed in the contract. But evidence of custom is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law.
3. *Sales—Orders—Negotiable instruments.*—Where the vendor of goods delivered to the vendee an order on the vendor's mill, in words and figures following, viz: "Eagle Mills, deliver to Lamb & Quinlin 200 barrels Eagle Steam flour. St. Louis, October 1st, 1867. E. O. Stanard"—held, that the order was not negotiable, and that the vendees could not assign to other parties any greater or different right than such vendees possessed.
4. *Contracts—Sales—Statute of frauds—Right of property, what sufficient to pass.*—If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right does not attach to the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price.
5. *Contracts—Sales, presumed to be for cash unless the contrary is stipulated.*—When nothing is said between a vendor and vendee as to payment, and where no time is stipulated for payment, it is understood to be a cash sale, and payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment be not immediately made, the contract becomes void.
6. *Contracts—Sales—Constructive delivery—Right of possession—Vendor's lien—Non-payment—Insolvent buyer.*—Even if the title has passed and the goods have been constructively delivered, possession could not have been coerced till payment was made, if the vendor has not surrendered possession. While he retains it his lien exists, and, though there may be a delivery which will pass the title, it will not necessarily destroy the lien. Unless credit is expressly given, which is a waiver of any right to demand immediate payment, the lien will continue to exist. So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver even when credit has been given.

Southwestern Freight and Cotton Press Co. v. Stanard.

7. *Contracts—Sales—Delivery and acceptance, when a question for the jury.*— In doubtful cases the question of delivery and acceptance is for the jury, under instructions from the court. But where the facts are clear and undisputed, what will amount to a delivery and acceptance, or waiver or destruction of lien must be determined by the court.

Appeal from St. Louis Circuit Court.

The facts are fully set out in the opinion of the court.

Jones & Anderson, with *Dryden & Lindley*, for appellant.

I. As the right and title of the appellant to the flour in controversy is derived from Lamb & Quinlin, the main question is, was there a sufficient sale and delivery by the respondent to them, in construction of law? The delivery of this order by the defendant (the seller) to Lamb & Quinlin (the purchasers) was a delivery of the property. The law does not require manual delivery, especially in the case of ponderous or bulky articles; and if the goods be placed in the power of the buyer, or his authority as owner be acknowledged by some formal act or declaration of the seller, it will amount to a sufficient delivery. (*Bass et al. v. Walsh*, 39 Mo. 199.) The delivery must be such as the case admits; if the seller does in any case what is usual, or what the nature of the case makes convenient or proper, to pass the control of the goods from himself to the buyer, it is sufficient. (3 Pars. Cont. 44; 2 Kent's Com. 699.) To determine what would be practicable or convenient in any case, the circumstances of the case must be considered—the situation of the parties and the nature and situation of the goods sold; and where, from the nature or situation of the goods sold, manual delivery would be difficult, slight acts are sufficient to constitute a delivery. (Pars. Merc. Law, 50; *Calkins v. Longwood*, 17 Conn. 164; *Bates v. Conkling*, 10 Wend. 389; *Jewett v. Warren*, 12 Mass. 300.) A manual delivery is not necessary, but the law does not require parties to perform acts that would be inconvenient; “it accommodates itself to their business and to the nature of the property;” and where manual delivery would be difficult, the seller is only expected to make a constructive delivery, which may be

Southwestern Freight and Cotton Press Co. v. Stanard.

done by performing any act which will show an intention on his part to relinquish his claim to the goods and to transfer the right to control the same to the buyer. (*Boynton v. Vesey*, 24 Me. 286; *Whitehouse, Ass., v. Frost*, 12 East. 614.) E. O. Stanard, the vendor, was the sole owner and proprietor of the mill, and, up to the time of sale, of all the flour in it. The person in charge was his employee, and was bound to obey his orders. When he gave this order, the effect of it was to direct that employee to consider the two hundred barrels of flour the property of the purchasers, and to permit them to take it away at once. No acceptance was necessary. The sanction of an agent is not needed to make any act of his principal effectual.

II. When goods are in the warehouse, storehouse, or in the possession of a third party, an order given by the vendor and accepted by the third party would be a delivery. (*Sto. on Sales*, § 289; *Hatch v. Bailey*, 12 Cush. 27; *Sahlman v. Mills*, 3 Strob. 384; *Stoveld v. Hughes*, 14 East. 308; *Whitehouse v. Frost*, 12 East. 614; *Sigerson v. Harker*, 15 Mo. 101.) Now, an order given by a vendor on his own mill, the effect of which is a command to his employee to permit the purchaser to take the property away at once, must be deemed as good as an order given on a third party and accepted by him. In one case the order is a direction by the vendor to the third party to consider certain goods in his house the property of the purchaser, and his acceptance is but an admission of the right of the purchaser to take them out of his house. In the other case the order of the vendor is an admission that the purchaser has goods in his own house, and that he has the right to take them away. This seems to be the practical view of the question, and it is one that is supported by authority. When the elementary writers lay down the rule that when goods are in the vendor's own house the delivery of an order, so long as he actually retains possession of them, will not defeat his lien, they evidently intend to lay it down as applicable only to those cases in which it was not contemplated by the parties that there should be an immediate change of place. Whenever the terms of the contract of sale are inconsistent with the existence of a lien, as where the agreement is

that the vendee shall have immediate possession, the seller has no lien. (Story on Sales, §§ 292, 339.) In the case at bar the act of the seller in giving this unconditional order, and the act of the buyer in turning that order over to the carrier for the purpose of putting the carrier in possession of the property, that it might be forwarded at once to New York, show that it was the intention of both parties that there should be an immediate change of place.

III. It can make no difference that the property was in the mill of the vendor and not in the house of a third party. If the warehouse had belonged to a third party, and the order had been given on that third party and accepted by him, it would without doubt be held that the delivery was complete in construction of law. There is nothing in reason or in principle to make the case different simply because the goods were in the defendant's own mill and the order was given on that mill. The unconditional order shows the intention of the seller to part with the goods. The act of the purchaser in turning it over to the carrier, and applying, upon the strength of it, for a bill of lading, shows not only his intention to receive possession at once, but that he considered the order as equivalent to the possession; and when the act done shows this intention, it is sufficient, no matter what the act is. (*Barrett v. Goddard*, 3 Mason, 107; *Chapman v. Searle*, 3 Pick. 38; *Scudder v. Worster*, 11 Cush. 573; *Frazier & Co. v. Hilliard*, 3 Strob. 308; *Arnold v. Delano*, 4 Cush. 39.)

IV. There are decisions of the courts to the effect that a delivery which will pass title to property does not necessarily defeat a lien. But it will appear, we think, that most if not all the cases in which the courts so held were cases in which it was not intended that there should be an immediate change of place; or where it appeared from the evidence that between vendor and vendee something remained to be done to make the delivery complete—as in *Arnold v. Delano*, 4 Cush. 33, referred to in *Sigerson v. Kahmann*, 39 Mo. 206, where the buyer was to go on defendant's land within a year and take the wood away; or where it appeared by the terms of the sale that cash was a condition, and

the delivery was made *sub conditione*. But in all cases of constructive delivery, where the intention of the seller to give up his claim and to give complete possession at once to the buyer is apparent, the delivery will annul the lien. (Story on Sales, p. 323, § 290, and all the cases above referred to.)

V. The order given by defendant, either on the day or day after the day fixed for the delivery, was an admission that the goods were ready for delivery, and he can not now be permitted to contradict it. This act of his was such as to induce others to believe that the goods were ready, and to act upon that belief and to alter their circumstances. The rule of law is clear that where one by his words or conduct induces or causes another to believe in the existence of a certain state of things, and to act on that belief so as to alter his own previous position, that person is concluded from averring a different state of things existing at the same time. But if this view as to the admissibility of the evidence is incorrect, it is insisted that the other view taken must be correct; that this order, coming into the hands of the purchaser under the circumstances mentioned, is *prima facie* evidence that the flour was ready, that everything had been done to it that had to be done to it to put it into deliverable condition; and it remains for the defendant to show to the contrary. This he has failed to do; he has failed to show that any separation was necessary; he has failed to show that there was any larger number of barrels of the same brand from which it had to be separated. There is no evidence tending even to show that there was any more flour of the same sort in the defendant's mill. The brand "Eagle Steam" distinguishes it from all other flour of a different brand; that identification is sufficient. (Scudder v. Worster, 11 Cush. 573.) The "separate identity" of the goods is sufficiently shown. More than all this, the general rule that, where goods are mixed with a larger quantity of the same sort, the property does not pass, does not apply in all cases. The intention of the parties, as shown by the evidence, must be looked to; and if it appears to have been their intention that the property should pass, the fact that something remained to be done will not control that intention. (Story on Sales, § 298;

Southwestern Freight and Cotton Press Co. v. Stanard.

Kimberly v. Patchin, 19 N. Y. 330; Horr v. Barker, 8 Cal. 603; Whitehouse v. Frost, 12 East. 614.)

VI. It does not appear that the condition of the sale was cash, and that delivery was made *sub conditione*. At the time of the agreement nothing was said as to when payment should be made, but the acts of the parties and their previous course of dealings show that there was no such condition; and it will be inferred from these previous dealings with each other that it was not expected that payment and delivery should be simultaneous. But even though it was a condition of the sale that the goods should be paid for on delivery, and they are delivered without demanding payment, the presumption is that payment is waived. (Smith v. Lynnes, 5 N. Y. 41; Carleton v. Sumner, 4 Pick. 516; Shindler v. Houston, 1 Den. 51.) It is submitted that the authorities referred to are conclusive that the delivery of this order after the agreement of sale was a delivery of the property, independent of any custom. And it is insisted that the evidence shows that this was a customary mode of delivering property of that description. At any rate, it may be safely said that there is evidence upon which a jury might have so found; and for that reason, if for no other, the court erred in taking the case from the jury at the instance of the defendant.

VII. The plaintiff has, on account of a liability incurred upon the faith of this delivery, an interest in the flour, and such a right to the immediate possession as entitles it to recover; and even should we admit that between vendor and vendee the lien remained, as between vendor and plaintiff that right is gone. The defendant delivered this order, which was the *indicia* of property, to the purchaser; and upon this evidence of ownership the purchaser, who had accepted it as a delivery, induced the plaintiff to incur a liability. This puts the plaintiff in as good a condition as a *bona fide* purchaser, and gives to it a right to the goods which can not be defeated by any claim of the vendor. Where owners of goods voluntarily deliver them and clothe the vendee with the *indicia* of property, though under such circumstances as would authorize a rescission of the sale between the vendor and vendee, the right is gone between vendor and *bona fide*

Southwestern Freight and Cotton Press Co. v. Stanard.

purchaser from such vendee. Both parties being innocent, the loss should fall upon the vendor who enabled his vendee to occasion the loss. (Gates v. Jennings, 13 Ill. 611; Hawes v. Watson, 2 Barn. & Cres. 540; Dows v. Green, 16 Barb. 72; Western Transportation Co. v. Marshal, 37 Barb. 514.) This order was the *indicia* of property, and was certainly *prima facie* evidence that the terms of the sale had been complied with, and that the vendor had no further claim upon the property. And the plaintiff had the right to accept this order from the purchasers, with their indorsement, as a delivery to it as carrier, and had the right upon it to give the bill of lading. "Strangers," as Lord Ellenborough said in Pickering v. Burt, 15 East. 42, "can only look to the acts of parties and to the external *indicia* of property."

Slayback & Spencer, for respondent.

The respondent claims that there never was any delivery of the flour; that he was entitled to his vendor's lien until there was a delivery; that he could not be deprived of such lien until either the purchase price was paid or actual delivery of the property. As he had not parted with the actual possession, no symbolical delivery could divest him of his lien where the purchase money remained wholly unpaid and insolvency had overtaken the vendee.

I. The evidence shows conclusively that no part of the flour changed hands—no part of the price was paid. We admit the defendant had made a sale. It was not an unconditional sale. No sale for cash is unconditional; but "if either party should refuse to perform his part of the contract, such as delivery by one party and payment of the price by the other, the other party would be entitled to rescind, and the contract may be treated as abandoned." (Sto. on Sales, §§ 424, 416.) "The non-compliance by one in any essential particular will entitle the other to repudiate the whole contract." (*Id.* § 415.) "If the payment of the price be a condition precedent to taking the goods, as it is in all cases where credit is not expressly or impliedly given, he (the vendee) can not take them till tender or payment thereof." (*Id.* § 403.) "And the vendee can not even tender part payment and take part of the goods." (2 Blackst. Com. 448.)

And where a sale is made for cash, the purchaser can not take the goods if the vendor claim his lien; and, more than that, the vendor may rescind the whole transaction and repudiate it *in toto*. (2 Cow. 56; 2 Barn. & Ad. 329, and note; Brown on Sales, § 307; Sto. on Sales, § 225.)

II. It is contended that the delivery of the card or note of sale on 'Change was a delivery of the flour constructively; *i. e.*, a delivery in the legal sense. We deny this proposition; but even if there was a constructive or symbolical delivery, "the vendor's lien is not defeated by any constructive delivery, except it be the only practical and feasible mode of surrendering possession." (Sto. on Sales, § 339.) And in the same section, "where the goods are to remain in the warehouse of the vendor, no symbolical delivery will be sufficient to destroy his possession." "But so long as the vendor does not surrender actual possession, his lien exists, although he may have performed acts which amount to a constructive delivery, so as to pass the title or to avoid the statute. For a lien does not import a right of property in the goods sold, but only a right of possession and detainer. Therefore, a delivery which will pass the title will not necessarily destroy the lien. In no case where the vendor retains actual possession is his lien defeated." (Sto. on Sales, §§ 290, 286; Hill. on Sales, ch. 16, p. 198; Long on Sales, 268; Townley v. Crump, 4 Ad. & El. 58-63.)

III. The order given by the respondent was nothing more than a shipping note, or, at most, an invoice, which is only a mercantile name for a bill of parcels or shop-bill. But a shipping note (it has been held) does not amount to a bill of lading, which is exactly like a bill of exchange, and passes the property by indorsement, and not by delivery alone. "But a shipping note is not indorsable." (Hill. on Sales, 239; Ackerman v. Humphrey, 1 Car. & P. 53.) Stoppage *in transitu* is a kindred right to that of vendor's lien. Hence, the decisions applying to one usually apply to the other class of cases exactly. (Hill. on Sales, 209; Bentall v. Burn, 3 Barn. & Cres. 423.)

IV. The appellant claims that although by construction of law no such change had taken place, yet according to the

Southwestern Freight and Cotton Press Co. v. Stanard.

usage at the city of St. Louis, where the sale transpired, it had; and that among the merchants of that city the delivery of that order was a complete delivery of the property. But "a usage can not be set up in contravention of an express contract." (Yeats v. Pym, 6 Taunt. 446.) And "the usage must be so general as to afford a very strong presumption that the contract was made in view of it, or the practice and course of dealing between the parties must have been so uniform as to furnish strong evidence that they recognized and assented to it." (Story on Sales, § 230, and cases cited.) The order meant, according to the custom and usage at St. Louis, simply a sale for cash. A sale for cash, we have shown, is a conditional sale. That condition remaining unfulfilled, the title does not vest in the vendee.

Whittelsey, for respondent.

The plaintiff sues for trover and conversion of property; it was therefore bound to show a real or a constructive possession in itself in order to prove a conversion by the defendant. The evidence presented by the plaintiff tended to show an agreement to sell (not a sale of) two hundred barrels of flour to Lamb & Quinlin, on October 1; 1867. We say an agreement to sell, not a sale, for there was no evidence proving or tending to prove a bargain and sale of any specific lot of two hundred barrels. The agreement was to sell the flour for cash, and the defendant gave Lamb & Quinlin an order on his mill for the flour, which order was countermanded because the flour was not paid for in cash, in accordance with the terms of the sale. The order was not equivalent to a receipt or acknowledgment that defendant held the flour subject to the order of Lamb & Quinlin so that a demand and refusal to deliver would constitute a technical conversion.

I. The contract of sale which will transfer the title of the thing sold to the purchaser must be for some specific thing, identified and capable of delivery at the time of sale, else it is a contract of sale merely. In *Jackson v. Hale*, 14 How. 525, it was held that a warehouseman's receipt for wheat which was not really delivered to him, and which was not actually in store, gave no

Southwestern Freight and Cotton Press Co. v. Stanard.

title to any particular wheat so as to justify an action of replevin against a party to whom the warehouse had been transferred. This two hundred barrels of flour was never at the risk of the purchasers, Lamb & Quinlin, as it was not shown that there was any particular lot of two hundred barrels to which the contract applied; that is, the flour did not exist as a specific, identical thing—something remained to be done by the seller to identify the article sold. (*Hening v. Powell*, 33 Mo. 468; *Bass et al. v. Walsh*, 39 Mo. 192; *Sigerson v. Kahmann*, 39 Mo. 206; *Gill et al. v. Pavenstedt et al.*, Am. Law. Reg. Sept. 1868, p. 672; *Whitehouse v. Frost*, 12 East. 614; 2 Kent's Com. 468, 492, 496.)

II. Lamb & Quinlin purchased for cash, and were therefore not entitled to demand possession of the flour, had the bargain and sale been complete, until tender or payment of the price agreed; and the plaintiff, as their assignee, could be in no better position. Where chattels are sold, although the title may pass so that the property is at the risk of the purchaser, still the purchaser, if the sale be for cash, is not entitled to the possession of the thing sold until the agreed price is paid or tendered. (2 Kent's Com. 492, 496; Pars. on Sales, 44, n. 1; *Id.* 48; Sto. Cont. §§ 803, 804; *Stone v. King*, 7 R. I. 358.) The attempt to prove that, by the custom, a sale for cash was a sale on credit of from three to five days failed. The evidence would have been inadmissible had the custom been proved, for it would have been an attempt to contradict an express contract by evidence of usage. (*Powell v. Horton*, 3 Scott, 110; *Humphrey v. Dale*, 38 Eng. L. and Eq. 120; 1 Greenl. Ev. § 280, n. 4; 2 Phil. Ev., C. & H., ch. 8, § 2; *Woodruff v. Merchants' Bank*, 25 Wend. 673; 6 Hill, 174; *Martin v. Hall*, 26 Mo. 886.)

III. The order given by defendant on his mill was not negotiable, so as to give the assignee any better right than the assignors had. It was not drawn for money, and therefore was not a bill of exchange. It was an order for the delivery of property, and the assignee therefore took it subject to all existing equities (Gen. Stat. 1865, p. 398, § 7) as between assignors and assignees. As the respondent had the right to retain pos-

Southwestern Freight and Cotton Press Co. v. Stanard.

session of the flour as against the purchasers until payment or tender of the price, the plaintiff could be in no better position as their assignee. (*Gill et al. v. Pavenstedt et al.*, Am. Law Reg., Sept. 1868, p. 672.) The question in this case is not whether the plaintiff can maintain an action for breach of contract in refusing to deliver two hundred barrels of flour, whereby the plaintiff has sustained damage, but the action is a plain one for conversion of property, of which the plaintiff had the possession or the right to the possession. As the defendant had never parted with the possession of the property, so as to permit any equities to intervene to estop him from asserting his right to retain possession until he was paid the agreed price, the plaintiff can not complain if he has given a bill of lading acknowledging the receipt of flour not in his possession, whereby Lamb & Quinlin were enabled to deceive an innocent party by procuring an advance of money upon faith of the bill of lading.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought its action against the defendant for the conversion of two hundred barrels of flour. The defendant was the owner of a steam flouring mill in the city of St. Louis; and in the latter part of September, 1867, he was at the Merchants' Exchange, and entered into an agreement with Lamb & Quinlin, then merchants of that city, to sell them two hundred barrels of flour, of the brand "Eagle Steam," at the price of thirteen dollars per barrel. The flour had to be made ready for delivery, and a day was fixed on which it was to be delivered, which was a few days subsequent to the agreement of sale. On the first day of October the parties again met, when the defendant gave to Lamb & Quinlin, the purchasers, an order written on a card, which is in the words and figures following, viz: "Eagle Mills, deliver to Lamb & Quinlin 200 barrels Eagle Steam flour. St. Louis, October 1st, 1867. E. O. Stanard."

Nothing was said, at the time the agreement was entered into or when the order was given, as to when payment should be made. There had been frequent previous dealings between the parties, and credit had been extended on purchases of flour for a few

days, but these credits were mere voluntary courtesies, and the dealings were considered as cash transactions. On the same day that the order was given, Lamb & Quinlin sold and transferred the order to the plaintiff, and received a bill of lading for the flour for transshipment to New York. Upon this plaintiff indorsed their draft for twenty-two hundred dollars, which, after being protested, it eventually had to pay.

On the evening of the day on which the order was given and transferred, plaintiff demanded the delivery of the flour, but defendant's agent, in charge of his mill, and acting by his direction and commands, refused to deliver the same, on account of Lamb & Quinlin's insolvency. On the facts, as substantially detailed above, the Circuit Court declared that the plaintiff was not entitled to recover. In consequence of this declaration the plaintiff took a non-suit, and, after an unavailing motion to have the same set aside, the cause is brought into this court by appeal.

A large mass of evidence was introduced to show a custom among the merchants that the effect of the order was to vest the title to the flour in the purchasers, and that from the time the card was handed over to them they became the absolute owners, and that the transference of the same to the plaintiff divested the defendant of all interest.

But this branch of the case was not made out; there was great diversity among the witnesses as to the force and meaning of the supposed custom, and, so far from tending to establish any open, uniform, and notorious rule, the most of the witnesses restricted themselves to declaring what their individual opinions were and the obligations they should have deemed resting upon them had they been placed in the defendant's situation. This, of course, was all illegal, and should have been excluded.

A custom to be good must be general, uniform, certain, and notorious; and, to be binding on parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed. Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose

of showing the intention of the parties in all those particulars which are not expressed in the contract. But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law. What constituted a delivery of the flour was a question of law, and the rights and liabilities of the vendor or vendee must be ascertained and fixed by the same standard.

It is insisted that the seller, by making and delivering the order to Lamb & Quinlin, clothed them with a title and enabled them to get credit with the plaintiff, and that, therefore, he should be held estopped from setting up any adverse claim, or averring anything to plaintiff's disadvantage. A conclusive answer to this is that the order was not a negotiable instrument, and the assignors were incapable of transferring to their assignee any greater or different right than they possessed.

The sale was for two hundred barrels of flour at the mills; no particular flour was designated, nor does it appear that it was ever set apart or identified. Whether it was all on hand, or formed part of a larger lot, unseparated and undistinguished, is nowhere shown in the case. If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is the universally recognized principle in the doctrine of sales. (2 Kent's Com., 11th ed., 664; *Hening v. Powell*, 33 Mo. 468; *Hanson v. Meyer*, 6 East. 614; *Simmons v. Swift*, 5 Barn. & Cres. 857; *McDonald v. Hewitt*, 15 Johns. 349; *Scudder v. Worster*, 11 Cush. 573; *Hutchinson v. Hunter*, 7 Barr, 140; *Field v. Moore, Hill & Den.*, sup., 48.) But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price. (*Cunningham v. Ashbrook*, 20 Mo. 533; *Bass v. Walsh*, 39 Mo. 192; *Macomber v. Parker*, 13 Pick. 183.)

The whole case shows that there was nothing said between the parties as to payment; and where no time is stipulated for payment it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse

Southwestern Freight and Cotton Press Co. v. Stanard.

to deliver without payment; and if the payment be not immediately made, the contract becomes void. (*Outwater v. Dodge*, 7 Cow. 85; *Woods v. McGee*, 7 Ohio, 128; *Levan v. Smith*, 1 Den. 571; *Comyn's Dig.*, tit. Agreement (B 3); *Palmer v. Head*, 13 Johns. 434; *Harris v. Smith*, 3 Serg. & R. 20; *Bainbridge v. Caldwell*, 4 Dana, 213; *Ferguson v. Clifford*, 37 N. H. 86; *Morris v. Rexford*, 18 N. Y. 552; 2 Kent's Com. 665.)

Had the title passed and the flour been constructively delivered, possession could not have been coerced till payment was made. The vendor had not surrendered possession, and while he retained the same his lien existed; and although there may be a delivery which will pass the title, it will not necessarily destroy the lien. (*Sto. on Sales*, § 290; *Arnold v. Delano*, 4 Cush. 38; *Sigerson v. Kahmann*, 39 Mo. 206.)

Unless credit is expressly given, which is a waiver of any right to demand immediate payment, the lien will continue to exist. So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver even when credit has been given. (*Reader v. Knatchball*, 5 T. R. 218, n.) It has been held, further, that where payment for the goods sold is to be made upon delivery, in the notes of a third party, who becomes insolvent between the time of the contract and the period fixed for delivery, the seller is not bound to deliver upon a tender of such notes, though they be not entirely worthless. (*Roget v. Merritt*, 2 Caines, 117; *Benedict v. Field*, 16 N. Y. 595.)

In *Gill v. Pavenstedt*, 7 Am. L. Reg., N. S., 672, A. purchased goods warehoused in a bonded warehouse from the importer B., in whose name they were entered. The goods were bought on credit at a specified price, and the duties were to be paid by A. as a part of the price. He had withdrawn, by permission of B., parcels of the goods at different times, paying the duties on such parcels. Before the credit expired, B. gave to A. an order on the bonded warehouse man to transfer the residue of the goods to A.'s name, which was accordingly done. As between the parties and the government, the goods still remained in B.'s name. They could only be withdrawn under the regulations of the treasury department, by a "withdrawal entry," signed by B. or by

McDermott v. Donegan.

some one authorized by him in writing. While the goods were in this condition, the purchaser, A., became insolvent. He demanded that B. should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price. And it was held that an act remained to be done, as between buyer and seller, of such a nature that there was no delivery, either actual or constructive, and that B. had a right of detention of the goods for the unpaid purchase money.

It is clear upon principle, reason, and authority, that the seller in the present case could not be compelled to part with his property till payment was made or tendered. But it is objected that the court erred in withdrawing the case from the jury. In doubtful cases the question of delivery and acceptance is for the jury, under proper instructions of the court. But where the facts are clear and undisputed, what will amount to delivery and acceptance, or waiver or destruction of lien, must be determined by the Court. Here there is no contest about the facts; they are few, plain, and simple, and I am unable to perceive that the court committed any error.

Judgment affirmed. Judge Bliss concurs; Judge Currier not sitting.

THOMAS M. McDERMOTT, Appellant, v. JOHN J. DONEGAN,
Respondent.

1. *Garnishment—Indebtedness—Defense.*—The plaintiff, in a garnishment based upon an alleged indebtedness, proposes only to succeed to the rights of the garnishee's alleged creditor as to the indebtedness; and whatever would defeat the creditor in a suit in his favor to recover the alleged debt will also be fatal to a recovery in such garnishment.
2. *Cairo and Johnsonville Packet Company—Stockholders, liability of for unpaid subscriptions—Conditions of charter—Construction.*—The charter of the Cairo and Johnsonville Packet Company provided that before the company should proceed to the transaction of the business intended to be prosecuted, the sum of \$350,000 must have been paid in as well as subscribed. The business to be done was the construction of wharf-boats, steamers, etc., and the carrying on of a freight and transportation business. The grantees named in the charter were to constitute a board of commissioners "to open books for subscription to the capital stock of the company for such an amount as in

McDermott v. Donegan.

their judgment the business of the company should require, but for no amount of subscription less than \$350,000." The charter further provides that within twenty days from the closing of the subscription the officers should be elected, and provides the manner of their election, their number, and term of office, and that the corporate powers of the company shall be vested in such officers. *Held*, that the company was warranted in organizing and attaining a corporate existence on the basis of a *bona fide* stock subscription of \$350,000. The provision that the company should not proceed with the contemplated transportation business until the \$350,000 had actually been paid in was for the benefit of those who might deal with the company—not for the benefit of stockholders, as a preliminary condition to the right to enforce collections of calls duly made upon the stock subscribed.

3. *Practice, Civil—Trials—Instructions.*—General and abstract instructions may mislead the jury, and should not be given.

Appeal from St. Louis Circuit Court.

On the trial the court gave the following, with other instructions :

"1. The amount of capital stock of a corporation fixed by the charter to be subscribed and paid in before the company is authorized to organize and proceed to business under such charter, is an essential condition to the enforcement of subscriptions to such stock ; and unless the jury believe from the evidence that the amount of three hundred and fifty thousand dollars had been subscribed and paid in before the St. Louis, Cairo and Johnsonville Packet Company proceeded to act under their charter, the plaintiff can not recover, and the jury will find for garnishee.

"2. In order to acquire such existence as will enable a corporation to enforce its subscriptions, the charter of such corporation must be accepted, and conditions precedent must be complied with according to the terms of such charter ; and unless the jury believe from the evidence that the St. Louis, Cairo and Johnsonville Packet Company had acquired such existence, the plaintiff can not recover, and the jury will find for the garnishee."

The other facts sufficiently appear in the opinion of the court.

Bakewell & Farish, for appellant.

I. The instructions were clearly erroneous. The second instruction was calculated to mislead the jury, and submitted to them purely a matter of law. The first instruction was erroneous,

McDermott v. Donegan.

because the act of incorporation read in evidence was sufficient to impart a legal existence to the St. Louis, Cairo and Johnsonville Packet Company, for the purpose of enforcing subscriptions to its stock, and because the garnishee was, by his subscription, estopped to deny that the said St. Louis, Cairo and Johnsonville Packet Company was a body corporate. (Ang. & A. Corp. §§ 636, 518; Dutchess Manufacturing Co. v. Davis, 14 Johns. 238; Sagory v. Dubois, 3 Sandf. Ch. 491; Vermont Central R.R. v. Claves, 21 Verm. 34.)

II. The act of incorporation may not be sufficient to give vitality to acts purporting to be done by the corporation, when it appears that the company has organized contrary to the requirements of its charter, and proceeded to business before a requisite amount of its stock was paid in; but this refers to matters of business outside and independent of subscriptions and the enforcement or collection thereof. The act of incorporation was read in evidence, from which it appeared that the parties therein named, and such others as might be associated with them, were created a body corporate, with power to sue, liability to be sued, and clothed with the right to sue and the power to enforce collection of subscriptions to its stock, independent of any organization. Such would seem to be the aim and scope of the charter, as otherwise the collection of subscriptions to the amount of three hundred and fifty thousand dollars could never be enforced, and the organization would fail. These subscriptions are mutual; there is a mutual obligation existing between all the subscribers. Their promise is to pay the amount of their subscription, and it is absolute and anterior to, and independent of, the organization or proceeding to business. The matter of proceeding to business has reference solely to the outside world, and can never be interpreted to mean payment of, or obligation to pay, subscriptions. The reservation in the charter was a matter between the State and the corporators. If it was infringed, the State, by proper proceeding, might have revoked the grant or enjoined its operation. It was intended as a protection to the outside world or community at large, and can never, in its letter or spirit, be construed to apply as a shield to delinquent subscribers to stock, to enable

McDermott v. Donegan.

them to break their engagements, and screen them from the force and obligation of their promises. Their engagement is absolute. They subscribe and promise to pay their subscription, and they are estopped to say the corporation was a fraud, or that their engagement was to pay only when the company was organized and proceeded to business.

Slayback & Spencer, for respondent.

I. There was no error in the court below. The instructions given by the court fully covered the law applicable to the case, and were as fair for one party as the other. "As the attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and can acquire no rights against the latter except such as the defendant had, and as he is not permitted to place the garnishee in any worse condition than he would occupy if sued by the defendant, it follows, necessarily, that whatever defense the garnishee could urge against an action by the defendant for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee." (Drake on Attach. § 672; Shelton v. Simonds, Wright's Rep. 724.)

II. So far as the company was concerned, Donegan, the respondent, had a good defense, which he had a perfect right to set up against the appellant, to-wit: that the company had not complied with the conditions precedent named in their charter as essential to a recovery by them of enforced subscriptions to their stock. (Redf. on Rail. § 51, notes; Ang. & A. Corp. § 291.) The appellant stands in no sense in a more favorable position toward the garnishee than the defendant would have stood had the defendant commenced suit. (Camp v. Byrne, 41 Mo. 534.)

CURRIER, Judge, delivered the opinion of the court.

Donegan is sought to be charged as garnishee of the St. Louis, Cairo and Johnsonville Packet Company, on the ground of an alleged indebtedness for an unpaid balance claimed to be due on his subscription to the capital stock of that company. He subscribed \$2,000 of the stock, and paid \$1,000, leaving a balance

of \$1,000 unpaid. The balance, the plaintiff, a creditor of the company, seeks to reach by this garnishment proceeding; but Donegan avers, as a reason why he should not be held to pay this balance, that his subscription for the stock was obtained fraudulently, by means of false statements and representations respecting the organization, standing, and condition of the company, at the time the subscription was made, and respecting also its business and financial situation and prospects. He avers that the company never had any legal organization; that \$350,000 in stock was never subscribed and paid in, nor subscribed at all in *bona fide* subscriptions, as the charter required as a condition precedent to its right to make and collect calls upon such stock as had in fact been subscribed. Issues were joined upon these allegations, and the evidence given upon them at the trial was conflicting. At the solicitation of the defendant (garnishee), the court instructed the jury: first, that in order to a recovery by the plaintiff, the jury must be satisfied from the evidence that \$350,000 of the capital stock of the company had been subscribed and paid in. The court also, at the request of the defendant, gave a second instruction, apparently intended to embrace the same legal principle incorporated in the first, but expressed in general and abstract terms. The plaintiff complains that these instructions are erroneous, containing false propositions of law, and that they are otherwise misleading and prejudicial to him.

The plaintiff seeks to recover a debt alleged to be due from the garnishee to the packet company. He proposes to succeed to the rights of that company; and whatever would defeat the company in a suit in its favor to recover the alleged balance will also be fatal to a recovery in this proceeding. (Drake on Attach. § 672.) This proposition is not contested, but it is objected that the court, by its first instruction, given at the request of the garnishee, interposed an obstacle in the way of a recovery, which would not exist if the suit were directly in favor of the packet company, to-wit: that \$350,000 must have actually been paid in, as well as subscribed, in order to warrant a verdict for the plaintiff.

This objection is well taken. The instruction would seem to

McDermott v. Donegan.

have been given on an inspection of the second section of the act incorporating the packet company, without comparing it with the residue of the act. This section provides that before the company shall proceed to the transaction of the business intended to be prosecuted, the sum of \$350,000 must first be paid in, as well as subscribed. The business to be done was the construction of wharf-boats, steamers, etc., and the carrying on of a general freight and transportation business, as provided in the next succeeding section of the act. It is, however, provided in the fifth section that the grantees named in the charter shall constitute a board of commissioners "to open books for subscription to the capital stock of said company, * * * and for such amounts as in their judgment the business of the company may require, but for no less amount of subscription than \$350,000." The section then provides that, "within twenty days from the closing of the subscription called for by the commissioners, an election for directors shall be held, under the inspection of said commissioners." The mode of election and the number and term of office of the directors is then defined. Section 4 provides that the corporate powers of the company shall be vested in these directors, and authorizes them to elect a president, etc. These sections clearly show that the company was warranted in organizing and attaining to a corporate existence on the basis of a *bona fide* stock subscription of \$350,000. The assessment of this stock and the collection of calls upon it were matters properly enough left to be attended to after the formal organization under the supervision of the commissioners, but the directors were not authorized to proceed with the contemplated transportation business until \$350,000 had actually been paid in. This was for the protection and security of those who might deal with the company, not for the benefit of the stockholders as such — at least not for their benefit in the sense of a preliminary condition to the right to enforce collections of calls duly made upon the stock subscribed. The court was therefore wrong in directing the jury, in effect, that the paying in of the \$350,000 was a condition precedent to the right to coerce payment of calls duly made upon the stock. For that reason the judgment of the court below must be reversed.

The First National Bank of Warsaw v. Currie et al.

Had the words "paid in," contained in the instruction, been omitted, it would have announced a correct legal proposition; for the directors were not warranted by the charter in proceeding to make calls and enforcing collections until the full sum of \$350,000 in *bona fide* solvent subscriptions was actually secured. Each stockholder or subscriber had a right to insist that this basis of strength should be established before paying anything. This was for the protection of the stockholders, to secure them against the consequences of initiating the corporation without the strength and subscription resources required by the organic law of its existence. (Redf. on Rail. § 51, par. 3, and the numerous cases there cited.) The second instruction is also indefensible. It is general and abstract, and ought not to have been given. It may have done no harm, but it was not calculated to do any good, and may have misled the jury.

The result is that the judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

THE FIRST NATIONAL BANK OF WARSAW, Respondent, v. THOMAS
L. CURRIE *et al.*, Appellants.

1. *Practice, Civil—Trials—Instructions must be predicated upon the whole case.*
—Where, in the course of a trial, a fact was developed by the testimony of one witness, it was error for the court to instruct the jury that if they believed that fact to be true they should find for a designated party accordingly. Instructions should be predicated upon the whole case and take in all the evidence.

Appeal from St. Louis Circuit Court.

Dryden & Lindley, for appellants.

Coonley, and *Madill*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The only error discoverable in the record is the giving of plaintiff's instruction, for which the judgment must be reversed. The issue was joined upon the indebtedness of the defendant as a

Mincke v. Skinner.

garnishee, and evidence was introduced upon both sides. A given fact was developed by one witness in the progress of the trial, and, at the instance of the plaintiff, the court instructed the jury that if they believed that fact to be true they should find for the plaintiff accordingly.

This was wrong. Instructions should be predicated upon the whole case and take in all the evidence. Courts are not at liberty to single out a particular fact and tell the jury that they must find their verdict on that fact, and thus virtually withdraw all the other testimony from their consideration. The verdict must be founded upon a consideration of all the evidence.

Reversed and remanded. The other judges concur.

GEORGE MINCKE, Respondent, *v.* JOHN W. SKINNER, Appellant.

1. *Land Titles — Conveyances — Description of property — Construction.*—

Two tracts of land, conveyed to different grantees by the same grantor, lay upon opposite sides of a pond, through which a creek flowed at the time of making the deeds. Both of the deeds describing the separate tracts of land gave the boundary line dividing them as "the middle of the natural channel of the creek when the pond is exhausted." These deeds also reserved the right of keeping up the dam and the flow of water in the pond forever. The water in the pond was drawn off or exhausted about eighteen or nineteen years after the deeds were made. *Held*, that the phrase "the middle of the natural channel of the creek when the pond is exhausted" meant the position of the thread of the creek at the time when the pond was actually exhausted. If the phrase "when the pond is exhausted" had been left out, the deeds would have provided for a shifting boundary, changing with the gradual changes of the stream, until the owners, by the withdrawal of the pond, could take possession of the bed and confine the stream. That phrase only fixes the time when this uncertain boundary should become certain, and fixes it at the precise time when the parties should be enabled to take possession. (*Primm et al. v. Walker*, 38 Mo. 94, cited and affirmed.)

2. *Evidence — Surveys, unofficial — Competency.*—A plat of land made by a surveyor, although not a record nor official in its character, when accompanied by the testimony of the surveyor who made the survey, and who testifies to its correctness, may properly be exhibited to the jury as a part of such testimony, and the accuracy of the plat may properly be left to the jury. It is not necessary that one who makes surveys should be a county or government surveyor to enable him to testify to his surveys or the correctness of any plat of them.

3. *Evidence—Depositions—Admissibility.*—A paper, purporting to be a deposition, which does not show in what cause it was taken, or whether with or without notice, or who was present examining and cross-examining, and was not filed in any particular cause, has none of the elements of a deposition, and should be rejected if offered in evidence.

Appeal from St. Louis Circuit Court.

The facts of the case sufficiently appear in the opinion of the court.

Isaac T. Wise, for appellant.

The court below erred: (I.) In granting the instruction given for plaintiff: 1. It calls for the location of the channel when the pond was exhausted, and then only. 2. It fixes on the year 1851 as the only time when the boundary channel could be ascertained, and makes the survey at that time conclusive as to its location. 3. It makes a survey, not made by a county or United States surveyor, legal evidence. (II.) In rejecting the deposition of Brown.

(I.) 1. One error manifest in the instruction given for the plaintiff is that it treats the exhaustion of the pond as a fact necessary to be found before the channel could become a boundary. The words used in the report and deeds, viz: "The middle of the natural channel of the creek in its natural bed, when the pond is exhausted," are purely and simply, every one of them, words limiting and defining the boundary, and nothing more. Those words are used in the report of the commissioners about thirty times in bounding about twenty lots. In all, the words "when," etc., are used in connection with words describing the boundary. The other boundary terms are purely and simply, every one of them, words limiting and defining the boundary. The presumption is strong that the men engaged in this most important work knew what they were about, and that, if they could, they would establish a boundary that would be certain to a certain intent, in every particular. The report shows that they knew where the channel was, and that they intended the boundary line of lots bordering on the pond to be the line of the lowest ground over which the creek ran before the dam was built, and over which it

would naturally flow when unobstructed. With this idea in view—viz., that the line of the lowest ground in the bed of the bare creek was to be the boundary—every word will be seen to be apt, fit, appropriate, and indispensable. 2. The boundary thus defined existed in 1832. The words appear to establish a present boundary. If by “when,” etc., it was meant to limit the boundary line to the lowest part of the creek, or, what is the same, to the deepest water of the pond, then the boundary existed in 1832 as much as in 1851 or 1856. If that boundary existed in 1832, the limits and bounds of lots were then accurately and actually fixed and determined at that time and from that time. It was not necessary to have the pond exhausted of water in order to find the boundary. If the boundary was on the line of the deepest water, it was ascertained by measurement, or could be established by witnesses who had seen the channel when the bed of the channel was wholly or in part bare. It is not required by the deeds. On the contrary, the deeds require that the pond shall not be exhausted. It is provided in the very deed to Newman on the record (as in the report) that the pond never should be exhausted, but should be kept up forever to its present hight, for the benefit of the owners of the mill. When parties seek to establish the proposition that an exhaustion is necessary, they should show some direct injunction or authority for it.

2. The court erred in fixing on the year 1851 as the only one in which the boundary channel could be found. If the boundary depends on the time of the exhaustion, then this was a fact to be left to the jury, and not a fact to be ascertained by the court. By selecting this year the court excluded all other times, before or after, from the jury. *Expressio unius exclusio alterius*. By directing special attention to the channel found in this year, they take from the jury the consideration of any other. The court settles the whole matter, decides that it is the true channel, that there is no objection to it, and no proof of any other. We further object to the action of the court in making the channel of 1851 the boundary, inasmuch as, if the creek was in 1851 a natural stream, in its natural bed, it could not be a fixed boundary—that is, unchangeable. A natural stream is a shifting

Mincke v. Skinner.

boundary. "It is by its very nature," Judge Holmes says, "a shifting, not a fixed, landmark." (*Primm v. Walker*, 38 Mo. 94.) If so, the boundary of 1851 would not do for any subsequent time.

T. T. Gantt, for respondent.

BLISS, Judge, delivered the opinion of the court.

This was an action for the possession of a parcel of land situate upon Tayon avenue, in the city of St. Louis, being a part of "Chouteau mill tract," so called. The plaintiff shows a chain of title to lot 20 of the tract, as apportioned among the heirs of Chouteau, of which he claims the land in controversy to be a part, and the defendant shows title through the same channel to lot 3; and the question is whether the land claimed by the plaintiff belongs to lot 20 or to lot 3. These lots are on opposite sides of, and are separated by, Chouteau's mill pond. The commissioners of partition, in 1832, deeded to plaintiff's grantor said lot 20 by the following description: "Beginning at the intersection of a street eighty feet wide (Tayon avenue) with Chouteau avenue; thence along the east line of said street north 14° 15' east to the middle of the natural channel of the creek when the pond is exhausted; then continue down the creek along the middle of its channel to the intersection of the line between lots 19 and 20; thence along said line to Chouteau avenue, and thence along said avenue five chains to the beginning." The description of the creek line in defendant's deed is substantially the same: "run to the margin of the pond and continue the same course, which is north 75° 15' west to the middle of the creek in its natural channel when the pond is exhausted, be the said distance more or less; thence with the middle of the channel of the creek as aforesaid to a point," etc. The "middle of the natural channel of the creek when the pond is exhausted" is the boundary dividing line of the parties, and the dispute arises in the interpretation of the words—the plaintiff claiming that they refer to the situation of the channel as ascertained when the pond was actually drawn off or exhausted in 1851, and the defendant that

it refers to the lowest part of the pond at the date of the deed, or to what would have been the natural channel of the creek had it then been exhausted.

The plaintiff, upon the trial, exhibited the plat of a survey of the channel immediately after the pond was drawn off, accompanied by the testimony of the surveyors as to its accuracy, which survey placed the disputed land in lot 20; and the defendant undertook to show by a number of witnesses that at the date of the deeds, and for some time after, the channel or deepest part of the pond was west of where it was ascertained to be when drawn off, and so far west as to include in lot 3 the land in dispute. The view taken by the Circuit Court of this matter appears from the following charge to the jury, given at the instance of the plaintiff, to which defendant excepted:

“2. The position of the thread of the channel of the creek of Chouteau’s pond in its natural bed when the pond is exhausted is the fact which will determine the boundary between the land of the plaintiff and that of the owner of the opposite land; and if the jury find from the evidence that the pond was exhausted in 1851, and that thereupon the plaintiff caused the thread of the channel of the creek in its natural bed to be surveyed, and the position of that thread of the channel is correctly shown by the plat of survey of Shultz, Hyer & Cozzens, given in evidence, and that Tayon avenue is the western boundary of the tract of land sold to plaintiff by Newman, and that the deeds and documents read in evidence by plaintiff are genuine and authentic, and that the defendant was in possession of the land described in the petition at the commencement of the suit, they will find the defendant guilty of the trespass and ejectment in the petition alleged.”

The survey of the thread of the channel referred to was the one made after the pond was drawn off in 1851; hence the whole merits of the controversy are involved in this instruction. Does the phraseology of the deeds confine the parties to the boundary to be ascertained at some future time, when the pond shall be exhausted, or is such boundary located at the date of the deed? These commissioners of partition executed a large number of deeds of land bounded by this pond, and in this respect the

Mincke v. Skinner.

phraseology of all was the same. Was it their intention to describe a present location of this boundary, as by planting a monument or calling for an existing landmark, or to provide a clear and certain mode of ascertaining it when the pond should be no longer in use?

These deeds reserved the right to keep up the dam and the flow of water in the pond forever, so that the position of the channel would be of no practical importance until the mill was abandoned. Possession of the land so flowed could not be taken until then, and it would seem quite natural to so provide for ascertaining the boundary at that time. The proceedings of the commissioners seem to have been had with great care and circumspection; and had it been their intention to make a present fixed boundary, it could easily have been done by running an imaginary line through the pond, laying it down upon their map, and making their deeds conform to it, or by temporarily drawing down the pond and ascertaining and measuring the channel as it then was.

Had the deeds made the boundary "the middle of the natural channel of the creek," leaving out the limitation "when the pond is exhausted," they would have provided for only a shifting boundary, changing with the gradual changes of the stream. It might have been near one bank at the date of the deed, and by such changes gradually approach the other; and it would continue to change until the owners, by the withdrawal of the pond, could take possession of its bed and confine the stream. This limitation is, then, no hardship to any one. It only fixes the time when this uncertain boundary shall become certain, and fixes it at the precise time when the parties shall be enabled to take possession. That it does so fix the time seems clear. "To the middle of the natural channel of the creek when the pond is exhausted" must mean to the middle, etc., at the time the pond is exhausted, otherwise the phrase "when," etc., has no meaning. This question was considered in reference to these very deeds in *Primm et al. v. Walker*, 38 Mo. 94, and the court then held that the thread of the channel did not become a fixed boundary until the pond was exhausted. Any other holding would unsettle the boundaries of a large amount of valuable property belonging to these parties

and to others, and render it impossible to establish them except by conjecture. It is probable that the deepest part of the pond between the lands of the parties to this suit was further west when the deeds were made than when the pond was exhausted, but precisely where it is impossible to tell. After long litigation, and listening to the opinions of those accustomed to bathe and fish in the pond, with no actual soundings and charts to guide them, juries would be compelled at last to fix some arbitrary line where they might conjecture the deepest part of the pond to have been, and it would be fortunate if they could all so reconcile their conjectures as to fix any line at all. It is more than probable that they would find themselves compelled to adopt the channel of the stream when the pond was drawn off as the best evidence attainable of what had always been the channel.

The defendant objected, upon the trial, to the exhibition to the jury of the plat of the survey of Shultz, Hyer & Cozzens, for the reason that it was not official in its character. This plat was not offered as a record, or as proof in itself, but was accompanied by the testimony of the surveyor who made the survey, and who testified to its correctness. It is not necessary that one who makes surveys should be a county or government surveyor, to enable him to testify in reference to his surveys or to the correctness of any plat of them. The accuracy of the plat was properly left to the jury.

Defendant offered in evidence a paper purporting to be a deposition of one Brown, and proved his death, which was rejected by the court. The paper had none of the elements of a deposition. It does not appear in what cause it was taken, or whether with or without notice, or who was present examining and cross-examining, and was not filed in this cause or any other. It was properly rejected. Some other matters are presented in the brief of defendant, but are not so raised upon the record that we can consider them. The record shows an attempt to prove that the channel of the creek was thrown eastward by work upon Tayon avenue and Clark avenue. Had it appeared that this channel was changed by such work, or by any other artificial means, before its position was fixed by the survey, it then would not have been

The State of Missouri, to use of Reagan, v. Romer et al.

the boundary, for it would not be "the natural channel of the creek." But the evidence all shows that no work was done upon these streets that could have had this effect until 1852, the year after the pond was "exhausted" and the channel of the creek established by survey.

The judgment of the Circuit Court is affirmed. Judge Wagner concurs. Judge Currier not sitting.

THE STATE OF MISSOURI, TO THE USE OF REAGAN, Respondent,
v. FRANCIS ROMER *et al.*, Appellants.

1. *Execution — Exemption — Construction of statute.*—Under the provisions of sections 9 and 11, of chapter 160, of the General Statutes, the head of a family is entitled to hold exempt from execution one hundred dollars' worth of household goods and furniture for the convenience and comfort of the family, and three hundred dollars' worth of other property to contribute to their maintenance and support.
2. *Execution — Exemption — Officer making levy, duty of.*—It is the duty of the officer having the writ or process in his hands, to notify the debtor of his rights of exemption from levy.
3. *Practice, Civil — Pleading — Answer — Avoidance.*—Where a suit was brought against a constable for an unlawful levy under an execution, an answer which attempted to avoid liability by stating that the constable took from the plaintiffs in the execution, bonds to indemnify him against all claim or harm, was properly stricken out on motion. The bond was not authorized by law, and furnished no protection to the officer against his trespass.

Appeal from St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

F. & L. Gottschalk, for appellants.

I. The second part of the answer was improperly stricken out. It stated a complete answer.

II. The proper measure of damages, in cases where no malice is alleged or exists, is the value of the property at the time of the trespass, with interest. The securities, certainly, are not responsible for anything more. (12 Mo. 313; 39 Mo. 222; 40 Mo. 97; 30 Mo. 216; 31 Mo. 571; 22 Mo. 170; 21 Mo. 289; 36 Mo. 351.)

The State of Missouri, to use of Reagan, v. Romer et al.

Stewart & Wieting, for respondent.

This suit is based upon the law of 1865. (Gen. Stat. 1865, p. 641, ch. 160, § 9, subdivisions 1, 2, 6, and §§ 11, 12, of the same chapter.) It is here enacted that certain property shall be exempt from execution; and the constable violated the law, and made breach of his bond in not apprising him of this right before making sale of the property.

WAGNER, Judge, delivered the opinion of the court

This was an action brought on an official bond, against the defendant Romer, as constable of the first and second wards in the city of St. Louis, and his securities. The breach assigned was the seizing and selling, under attachment and execution, of Reagan's property, which was exempt from levy and sale by statute, he being at the time the head of a family.

The petition also alleged that Romer, at the time of making the seizure and levy, failed to notify Reagan and apprise him of his rights to claim and keep the exempted property, and that when Reagan found the property had been seized, he gave to Romer a written notice, claiming the same and demanding to have it appraised, but that Romer refused to accede to the request. The answer denies most of the allegations, admits the notice, and attempts to avoid liability by stating that when Romer was notified of the claim he took from each of the plaintiffs in the attachment suits a good and sufficient bond, with sureties thereon, to indemnify him against all claim or harm.

This part of the answer setting up an avoidance on account of taking bond was stricken out on motion. There was no error in this; the bond was not authorized by any provision of law, and furnished no protection to the officer against his trespass.

It appears from the evidence that all the household goods owned by Reagan were seized and sold, even to his family bible, together with a small grocery store and a one-horse wagon and horse.

The jury found that the furniture, bedding, etc., were of the value of \$100, the other goods and property, \$300; and they awarded him \$300 as damages — making the verdict for the total

The State of Missouri, to use of Reagan, v. Romer et al.

sum of \$700. The plaintiff voluntarily remitted \$200, and the general term modified the judgment, so as to make it for only \$400, the actual value of the property taken.

Section 9, of chapter 160, of the General Statutes, exempts various articles of household goods, when owned by the head of a family, not exceeding in value one hundred dollars. Section 11 gives to each head of a family, at his election, in lieu of the property mentioned in the first and second subdivisions of section 9, any property he may select to hold exempt from execution, not exceeding in value the amount of three hundred dollars.

Section 12 makes it the duty of the officer executing process to apprise the person of his right to make the selection, and points out the mode of appraisal and proceeding when the property is claimed.

The law, then, makes express provision that the head of a family shall have one hundred dollars' worth of household goods and furniture, for the convenience and comfort of the family, and three hundred dollars' worth of other property, which may be selected in lieu of certain specified articles, to contribute to their maintenance and support. These articles are all exempt from levy, and it is the duty of the officer having the writ or process in his hands to notify the debtor of his rights. That was not done in this instance, and the officer even refused to allow the claimant to avail himself of the privileges conferred on him by law. The act of the officer was wrongful, oppressive, and contrary to the mandates of the statute, and rendered him liable to an action.

After the *remittitur* and the modification of the judgment at the general term, Reagan's judgment was for the actual value of his property, and no more; and the question of the allowance of damages was ignored, and is no longer an element to be considered in the case.

The action of the court in giving and refusing instructions seems to have been unobjectionable. The issues were fairly presented, and the judgment is for the right party and should be affirmed.

Judgment affirmed. The other judges concur.

 Bernecker v. Miller et al.

JOHN L. BERNECKER, Respondent, *v.* WENDELIN MILLER and
MARTIN MILLER, Appellants.

1. *Practice, Civil—Cotemporary suits in different courts, effect of.*—A. sued B., with other defendants, for partition of certain lands. Afterward, before the first suit was determined, B. brought suit in another court against the other defendants for the partition of the same lands, without joining A. in the suits; and a judgment was had in this second suit, a sale made, and a sheriff's deed of the land executed. In a subsequent trial, in a different action, an attempt was made to impeach the judgment in the second suit, and the sheriff's deed, on account of the pendency of the previous action. *Held*, that in the third action the proceedings in the second suit could not be treated as void because of the pendency of the first. It was the duty of the defendants in such second suit, when properly served, if they objected to answering in the courts, to have pleaded in abatement the proceeding pending in the other court. This is the universal practice. There may be circumstances which would authorize the double proceeding, and the matter should be brought to the attention of the court by plea, that it may pass upon the preliminary question before proceeding to final judgment.
2. *Practice, Civil—Collateral judgments, impeachment of.*—A judgment can not be impeached collaterally for its defects. Such judgment and its recitals must be treated as correct until reversed.
3. *Practice, Civil—Parties—Minor defendant.*—Where a defendant in a suit is a minor at the time of the service of the summons, but the record shows that she appears by counsel, and she becomes of full age before judgment is taken, the judgment is not void because of her minority at the time of service.
4. *Practice, Civil—Trials—Fraud—False entry on record—Judgment—Presumptions.*—If the court is so imposed upon as to suffer a false entry of appearance by a defendant to be made, when the defendant neither appeared, nor suffered any one to appear for him; if from defendant's want of knowledge of the English language, and his general ignorance of what was progressing or of its effects, he was actually deceived by the plaintiff, and by his acts was induced to lie idle, and suffered injury in consequence, it is a fraud in fact, which, if made to appear in a proper way, would destroy any rights which plaintiff may have acquired from his legal proceedings. But courts will not assume that such frauds are practiced, and will not find them unless upon proper issues and clear proofs.

Appeal from St. Louis Circuit Court.

In 1835 Morgan Lich owned and occupied forty acres of land, the west half of the east half of the northeast quarter of section seven, township forty-five north, range six east—the same here sued for. Frederick Clouse owned the east half of said eighty

Bernecker v. Miller et al.

acres at said time. Morgan Lich was in possession of the west half of said eighty acres from 1835 until his death, in 1850; and the widow and heirs continued in possession until her death, in February, 1862, and the heirs have been in possession ever since. Clouse was in possession of the east half of said eighty acres the same length of time. Morgan Lich had no interest in the east half, and Clouse had no interest in the west half. John Bernecker's wife was a daughter of Morgan Lich. One Peterson and wife, and one Ladue, brought their suit in partition for three-eighths of these eighty acres, against Clouse and the heirs of Morgan Lich, to the October term, 1858, of the Land Court. Bernecker and wife were parties to said suit, she being an heir of Morgan Lich. Afterward, before said suit was reached for trial, Bernecker and wife brought their suit for partition, against Lich's heirs and Clouse, of said eighty acres. Peterson and wife and Ladue were not made parties. The suit was brought in the St. Louis Court of Common Pleas, at the November term, 1859. They obtained judgment for partition of the eighty acres before the Peterson case was reached for trial. The east half was assigned to Clouse, and the west half ordered to be sold. Bernecker was the purchaser, at five dollars per acre, and obtained the sheriff's deed. Mrs. Wendelin Miller was under age when the petition was filed, but was of age when the judgment was taken. Morgan Lich left seven heirs. Afterward the Peterson case, in the Land Court, was tried and consummated to a judgment for partition for three-eighths of the eighty acres. The west half, on the petition of Bernecker, was assigned to him on his sheriff's deed without any consent of Lich's heirs, who were parties. The east half was ordered to be sold, and purchased by Bernecker. All the interest of Peterson and Ladue (three-eighths) was concentrated in the east half.

The plaintiff read in evidence, and relied upon for title, his sheriff's deed. He also read in evidence a deed from Clouse, and sheriff's deed for the east half, and a lease (objected to) to Miller of the eighty acres for two years, dated April 26, 1862. Defendants paid the rent, but refused to give up the west half at the expiration of the term. Plaintiff sued them, and the sheriff put

Bernecker v. Miller et al.

him in possession on the 18th of May, 1866. He did not turn out Martin Miller. Wendelin Miller afterward came back into the possession.

The defendants then asked the following instructions, which were refused :

1. If William D. Peterson and wife and P. A. Ladue filed their suit for partition in the St. Louis Land Court, against Frederick Clouse and the widow and heirs of Morgan Lich, for partition of the whole tract of eighty acres, and obtained judgment therein for three-eighths thereof, and the said John L. Bernecker and wife, pending said suit, and before said judgment, filed their suit for partition, in the whole tract of eighty acres, against the widow and heirs of said Morgan Lich, in the St. Louis Court of Common Pleas, with notice of the pendency of said suit of Peterson and others, and were parties to the same, and said Peterson and wife and said Ladue were not parties to said suit in said Common Pleas Court, and Elizabeth Lich, one of the defendants, was under the age of twenty-one when said suit was filed, and no guardian *ad litem* appointed for her, and Bernecker and wife obtained judgment and order of sale before the trial of said case of Peterson and others, and obtained the sheriff's deed for the west half of said eighty acres at five dollars per acre, then said sheriff's deed is invalid as to the rights of said Morgan Lich's heirs, and absolutely null and void.

2. If the said Bernecker and wife filed their suit in said Common Pleas Court, for partition of the whole tract of eighty acres, against the widow and heirs of Morgan Lich, and against said Frederick Clouse, as detailed in instruction No. 1, and in their petition, by the allegations and prayers thereof, claimed and alleged that the heirs of the said Morgan Lich were entitled to the undivided half of the whole tract of eighty acres, and Frederick Clouse to the undivided half thereof, and the said Clouse owned exclusively the east half thereof, and the heirs of Morgan Lich owned exclusively the west half thereof, then said suit was limited, as to Morgan Lich's heirs, to one-half of the west half of said eighty acres, and a judgment rendered on said petition, inconsistent with this proposition, is not only null and void in itself

Bernecker v. Miller et al.

as to one-half of the west half of said eighty acres, but, with the facts detailed in instruction No. 1, wholly null and void, and the title acquired by said Bernecker, through said judgment in said partition suit in the St. Louis Court of Common Pleas, to the west half of said eighty acres, inures to the heirs of said Morgan Lich, as in the nature of a trust.

P. C. Morehead, for appellants.

I. The judgment rendered in the Court of Common Pleas was void. If a judgment is rendered for land not claimed or set out in the petition, it is a nullity. Where a suit was already pending in the Land Court, between the same parties, for a partition of the same land, the plaintiffs in the Common Pleas Court being parties, and the plaintiffs in the first suit were not parties in the last suit, as required by statute, there was a want of jurisdiction.

According to the evidence in this case, Morgan Lich's heirs had no interest in the east half of the eighty acres, and Frederick Clouse had no interest in the west half. They owned and occupied their respective tracts over thirty years, separated by a fence.

Bernecker's suit in the Common Pleas Court was for partition of the whole eighty acres, claiming for Lich's heirs the undivided half, and leaving twenty acres in the west half unaffected by the suit. (24 Mo. 385; 34 Mo. 194; 2 How. 43; R. C. 1855, p. 1111, § 3.)

II. The plaintiff could only recover on his own evidence. He rested the case solely on his sheriff's deed, through which he acquired no title, because the title was tied up—it might be said, vested in the Peterson case. The bare evidence gave no strength to his title on the deed. It is irrelevant, containing separate issues, and requiring a different suit. (40 Mo. 473.)

Here the courts had concurrent jurisdiction—the first taking cognizance of the same matter retained the entire jurisdiction to final judgment, and consent or confession could not confer it on another. But this jurisdiction must be limited strictly to the matters contained in the petition. (1 Strob. 1; 1 Md. Ch. 3, 351; 2 How. 43; 3 Ohio, 373; 4 McCl. 233; 13 Ill. 432; 2 Greene, Iowa, 374; 3 McCord, 280; 3 Caines, 129.)

Bernecker v. Miller et al.

Wendelin Miller and Martin Miller are both defendants. There is no evidence whatever in the case affecting the rights of Martin Miller; he was in possession ten years; the answer says Mrs. Wendelin Miller, who is not sued, was in possession with her husband in her own right as to one-seventh. She was under age when Bernecker's partition suit was filed, but of age when the writ was served. Nevertheless, she has been in possession since the death of her father in 1850, and her husband with her since 1856.

R. S. McDonald, for respondent.

I. All parties had full notice. Elizabeth, wife of the appellant Wendelin Miller, lacked six days of being twenty-one years of age when served, but was of age when she appeared in court. A guardian *ad litem* could not have been appointed.

II. The sheriff's deed in evidence conveyed to respondent on the 17th of December, 1860, all the title to the land in question which the heirs of Morgan Lich ever had.

III. In 1862, long after Bernecker had purchased this property, with a full knowledge of all the particulars, Wendelin Miller becomes the tenant of Bernecker for the whole tract of eighty acres for two years, and paid the rent during that time. After the determination of the lease Miller held over, and Bernecker brought suit of unlawful detainer, and obtained a writ of restitution, and Wendelin was turned out and Bernecker placed in possession. On the same day Miller re-enters, and still remains in possession. How can the possession of Miller be continuous, when for two years he was Bernecker's tenant under written lease, and was once dispossessed by the sheriff? If the east half of the tract alluded to in the evidence has any bearing on the case, then the respondent's title is still more complete. If Clouse had a title, his deed to Bernecker passed the same. If Peterson and Ladue had an interest, the partition sale and sheriff's deed to Bernecker passed their title. Thus every interest, whether real or imaginary, was purchased by Bernecker. All titles in either tract center in Bernecker, and are his by every legal right. The record of the partition suit of Peterson *et al.* v. Clouse

Bernecker v. Miller et al.

et al., offered in evidence by appellant, showed that an agreement was made between counsel representing all parties, that a decree should be and was granted, giving to John L. Bernecker absolutely the west half of said tract, without any claim on the part of the other parties in interest. Without any further evidence, this record shows a good and valid title in Bernecker.

BLISS, Judge, delivered the opinion of the court.

This is an action for the possession of the west half of the east half of the northeast quarter of section seven, in township forty-five north, of range six east, of the St. Louis land district; and the parties agree that Morgan Lich, deceased, held the legal title: the plaintiff claiming the land according to the whole record—though he fails to show such title in making his case as purchaser upon sale in partition—and defendant Wendelin Miller claiming the land through his wife Elizabeth, who is daughter of Morgan Lich. The title to the east half of the east half of the same quarter-section is mixed up with that of the west half in the record and in the partition suits shown in evidence, but defendants do not dispute the plaintiff's right to that portion of the half-quarter. The plaintiff, in the outset, relies mainly upon a lease executed by him to defendant Wendelin Miller, April 26, 1862, for the whole eighty acres, including both the east half and the west half of the east half of the quarter-section. This lease has figured largely in this and the Circuit Court, and has cost the defendant dear. Proceedings for unlawful detainer, and proceedings upon the appeal bond from a judgment for such detainer, have been brought here, and we have been compelled to sustain them because of this lease, although the defendant claimed, but did not so set forth and show as to be able to avail himself of it, that the lease was supposed by him to cover only the east half, he never intending to acknowledge the plaintiff's title to the west half. (*Bernecker v. Miller*, 37 Mo. 498; same, 40 Mo. 473; and same decided at this term.)

But defendants are not now in possession under this lease. It appears from testimony offered by them that Martin Miller is in possession by permission of the heirs of Morgan Lich, and that

Wendelin claims by the heirship of his wife. Hence, the plaintiff must show a better title. When the plaintiff rested his case, judgment might have been given for him against Wendelin Miller by virtue of the acknowledgment of the lease, and against him in favor of Martin for want of evidence; but the case proceeded and developed a strange medley of cotemporaneous partition proceedings in different courts, under which the plaintiff claims title.

On the 20th of March, 1858, one Peterson and wife (a daughter of Lich) and one Ladue, the nature of whose title does not appear, presented to the St. Louis Land Court their petition for partition of the whole eighty acres, being the east half of the northeast quarter of section seven, etc., making one Frederick Clouse (who owned a large interest in said eighty acres, sometimes called half and sometimes less) and George Lich, William Lich, John Lich, Laura Lich, Catherine Lich, Catherine Engel (late Lich) and her husband, Susan Bernecker (late Lich) and her husband, the present plaintiff, and Elizabeth Miller (late Lich) and her husband, the present defendant Wendelin Miller, heirs of Morgan Lich, defendants.

Process was served upon all the defendants but William Lich, who was not found, and upon one George Clouse. On the 15th of January, 1860, John L. Bernecker, the present plaintiff, presented a motion to set aside a preliminary order, and make Frederick Clouse a party instead of George Clouse, upon whom process had been served; but neither the preliminary order nor the action of the court upon the motion is given, and allusion to the matter is made only to show that the present plaintiff was actually in court and active in the proceedings. No answers are filed, and it nowhere appears that any of the defendants appeared except the present plaintiff, although the judgment recites that the plaintiffs came by their attorneys, and the defendants, George Clouse, George Lich, etc., "answering by their attorneys, and John L. Bernecker comes by his attorneys," etc. This judgment was entered in the Land Court in 1861, March 20, and finds that the plaintiffs and the defendant, John L. Bernecker, are the owners of the whole eighty acres, though how the interest of Clouse and the other heirs of Lich became divested nowhere appears in the

records of that court. The interlocutory judgment found the proportionate interests of the parties, giving Bernecker five-eighths of the whole, and appointed commissioners. They report, as usual, that it can not be divided, and recommend a sale, and afterward the parties—*i. e.*, the plaintiffs and Bernecker—stipulate that the west half of the premises (this being the land to recover which this ejectment suit is brought) shall be set apart to Bernecker, and the east half shall be sold and the proceeds divided—one-half going to Peterson and wife, one-fourth to Ladue, and one-fourth to Bernecker. The court, in its final order of February 27, 1862, affirms this stipulation, orders that the said west half of the eighty acres named in the petition “be and the same is hereby set apart and allotted absolutely to the defendant, John L. Bernecker, free from any and all right or claim of the other parties to this suit,” and that the east half be sold and the proceeds divided as stipulated. The sheriff’s deed to the plaintiff, upon sale under this order, was offered in evidence by him in opening his case, though precisely why does not appear; but it shows that he bid in the east half of the eighty acres, which is not the half in controversy, for thirty-six dollars an acre.

We have seen that in March, 1861, the court assumed that all the defendants to the suit had in some way lost their interest in the premises. There was no amended petition showing that at the commencement of the suit they had no interest, or explaining how they had become divested of the interest alleged in the petition. There was, however, evidence submitted to the court on the subject, and consisted of a sheriff’s deed to Bernecker of the land in controversy, purporting to have been made in pursuance of an order of sale from the St. Louis Court of Common Pleas, upon a petition for partition presented to that court by the plaintiff, Bernecker, while the partition suit was pending in the Land Court. Also, the record of the proceedings in the Court of Common Pleas, in full or in part, was offered below, and is preserved in the bill of exceptions; so that it appears that, upon order of sale in the Common Pleas, the plaintiff purchased the west half of the eighty acres at five dollars per acre.

The record shows that on the 31st of October, 1859, the said
8—VOL. XLIV.

Bernecker v. Miller et al.

Bernecker and wife presented to the Court of Common Pleas a petition for partition and sale of the whole of said eighty acres, and made parties defendant: Frederick Clouse, Catherine Lich, the widow, and George, William, John, and Laura Lich, and Elizabeth Miller and her husband Wendelin (the present defendant), and Catherine Engel and her husband, heirs of Magnus Lich, deceased. Process was served November 1st on all the defendants except William Lich. The record shows no answer, and no appearance except by the recitals of the decrees or orders, and on the 24th of May, 1860, a decree of partition was rendered for the whole eighty acres, which decree recites that "Wm. Lich appeared in person, and the other defendants by Kribben & Kehr, their attorneys," etc.; and finds that Clouse is entitled to the east half of the eighty acres, and the plaintiff and other defendants are entitled to the west half, and that Catherine Lich, the widow, is entitled to dower, and appoints commissioners to make partition. October 31 an order was entered confirming the report of commissioners and ordering sale, and December 21 the sale was confirmed, though no report of commissioners is given, nor does it appear by the order of confirmation to whom the sale was made.

The date of the birth of Elizabeth Miller (late Lich) was proved, which makes her twenty-one years of age, November 6, 1859, six days after service upon her in the second suit. Defendants also proved that they are in possession of the land in controversy with the consent of the heirs of Morgan or Magnus Lich. The plaintiff then offered in evidence a deed from Frederick Clouse to him of all his interest in the eighty acres, made January 21, 1861, after the partition decree in the Common Pleas, and before the one in the Land Court.

The instructions sought on behalf of the defendants, and refused, ask that the proceedings in the Court of Common Pleas be treated as void for two reasons—first, the pendency of the suit in the Land Court; and, second, the minority of Elizabeth Miller when served with process. This can not be. The proceedings in the Court of Common Pleas were not void for either reason. The defendants were all served with process, and it was

their duty, if they objected to answering in two courts, to have pleaded in abatement the proceeding pending in the other court. This is the universal practice. There may be circumstances that would authorize the double proceeding, and the matter should be brought to the attention of the court by plea, that it may pass upon the preliminary question before proceeding to final judgment. Nor is the proceeding void from the minority of Elizabeth Miller, from the fact that when judgment was taken she was of full age, and that in the judgment it is alleged that she appeared by counsel. It does not appear that she or any of the defendants filed answer to the petition, nor was any default entered against them, as the statute concerning partition requires if no answer is put in. But neither does it appear that the full record of the partition suit was exhibited in evidence—answers may have been in and not shown by defendants—nor can we impeach a judgment collaterally for its defects. We are bound to treat it and its recitals as correct until reversed. It will never do to closely scrutinize the irregularities of unreversed and subsisting judgments in collateral actions. The most fearful havoc would ensue to rights of property, and to that security that should arise from adjusted controversies, if courts were to indulge in that luxury.

Defendant's brief strongly presses upon the court the consideration of fraud on the part of the plaintiff, and I am not without suspicion that there may have been some unfairness on his part. But the record neither sets up nor shows facts that would constitute fraud. Elizabeth Miller, through whom the defendants claim an interest in the premises, was served with process in both partition suits when a minor. The judgment in both suits shows that she appeared upon the hearings. If this were false in fact, and the courts were so imposed upon as to suffer a false entry of the kind to be made; if she neither appeared nor authorized any one to appear for her; if she has not received the petty proceeds of the sale of her interest in the estate; if, from her want of knowledge, or that of her husband, of the English language, and from their general ignorance of what was progressing, or of its effect, they were in fact deceived by the plaintiff; if by his acts they were induced to lie idle, and unwittingly suffered their patri-

State ex rel. Frank, petitioner, v. Smith.

mony to slide into his hands, it is a fraud in fact, which, if made to appear in a proper way, would destroy any rights he may have acquired from his legal proceedings. But courts will not assume that such frauds were practiced, and will not find them unless upon proper issues and clear proofs. Such issues have not been made nor such proofs adduced in the present case, whatever suspicions may arise from the inadequate price paid for the land. In view of this suspicion, we have sought for some legal excuse for reversing the judgment and granting a new trial, with leave to amend the answer or file an equitable counter claim in the nature of a cross-petition; but we can not do so without acting as the legal adviser of parties, instead of arbiter of their disputes, and without establishing a precedent that might come back to plague us.

We are compelled to affirm the judgment below. The other judges concur.

STATE *ex rel.* GEORGE FRANK, Petitioner, v. IRWIN Z. SMITH,
Circuit Judge, Respondent.

1. *Mandamus* — *St. Louis Circuit Court* — *Time for filing exceptions* — *Construction of statute*. — The fourteenth section of the law organizing the St. Louis Circuit Court (Gen. Stat. 1865, p. 889) takes that court out of the operation of the general law (Gen. Stat. 1865, ch. 169, §§ 27, 28) permitting exceptions to be filed at any time during the term; and, by virtue of that special act, the St. Louis Circuit Court has power to prescribe the limitations for filing exceptions named in the 12th and 16th rules adopted by it, in the revision adopted January, 1866.

Application for mandamus.

Respondent, in his return, after setting forth the twelfth and sixteenth rules of court, proceeded as follows:

“And the respondent further shows that the appeal of the said Frank was not prayed for by him, as required by said rule numbered twelve, within five days after the rendition of the judgment overruling his motion for a rehearing on the 25th day of February, 1869; nor was his bill of exceptions presented within five

State ex rel. Frank, petitioner, v. Smith.

days after said day to the attorney for the opposite party, although the said Frank did show cause why his time should be extended, and it thereupon was extended by the court until the 15th day of March, 1869, as will appear by the records of said Circuit Court; yet the said Frank did not present his bill of exceptions within the time so extended, and did not show any cause whatever why his time for praying for an appeal should be further extended, nor any cause whatever why his time for presenting his bill of exceptions should be further extended, but did, after the expiration of the time so extended, to-wit: on the 17th day of March, 1869, present his bill of exceptions to the court, insisting to have the same signed by your respondent, and insisting that the said rules numbered 12 and 16, above recited, were in contravention of law, and null and void. Wherefore, your respondent prays the judgment of this court whether he should sign said bill of exceptions and grant said appeal prayed for by said Frank."

Thomas S. Espy, and Vorhies & Mason, for petitioner.

I. Rules 12 and 16 of the Circuit Court are in derogation of section 28 of Gen. Stat. 1865, p. 675, which provides that "exceptions may be written and filed at the time, or during the term of the court at which it is taken, and not after." Section 14 of the act reorganizing the Circuit Court (Gen. Stat. 1865, p. 889) confers no power to make rules that may conflict with the laws in any way, but only to prescribe rules "to procure uniformity, regularity, and accuracy" under the law, in accordance with the provisions of section 14, chapter 133, Gen. Stat. 1865. These objects can be attained in perfect conformity to section 28 of the practice act.

II. The rules of the Circuit Court are an abridgment of a right, and without clear and express authority, legitimately exercised, can not be allowed to stand in the way of a right secured by the general law.

III. If the Legislature had intended, in the act of reorganization, to repeal any of the general law, or to confer upon the Circuit Court a power to make rules that would involve the setting

State ex rel. Frank, petitioner, v. Smith.

aside any of the general law, such power could have been given in specific language and in specific terms.

IV. The twenty-eighth section is not repealed by necessary implication of law. There is no antagonism between it and the act of reorganization. And if there is any repeal by implication, whatever in the act of reorganization is antagonistic to the twenty-eighth section was repealed by the subsequent enactment of the General Statutes.

V. The power to make rules under the act of reorganization, in opposition to existing laws, is the power of legislation—a power which the Legislature never intended to confer upon the court, and could not if it would.

VI. There can be no necessity for rules 12 and 16. The peculiar organization of the Circuit Court does not require them.

Dryden, and *Decker*, for respondent

WAGNER, Judge, delivered the opinion of the court.

The relator asks for a peremptory writ of *mandamus* against the respondent, who is one of the judges of the Circuit Court, to compel him to sign a bill of exceptions. The cause is submitted on a demurrer to the return, and the only question on which the judgment of this court is asked is whether the rules of the said Circuit Court in prescribing the time within which the exceptions shall be made out and presented to the judge at special term for his signature, in order to take a case to the general term, are valid and binding. It is insisted by the counsel for the relator that the rules adopted by the Circuit Court are in contravention of the statute, and therefore have no force, and should be disregarded. The general practice throughout the State on the subject is well understood, and clearly expressed in the statute. The law provides (Gen. Stat. 1865, ch. 169, §§ 27–8) that whenever, in the progress of any trial, in any civil suit pending in a court of record, either party shall except to the opinion of the court, and shall write out his exceptions, the judge shall sign the same. But the exception must be written and filed at the time, or during the term of court at which it is taken, and not after. Such is the

State ex rel. Frank, petitioner, v. Smith.

rule, as declared by statute, applicable to the circuits throughout the State.

But the organization of the St. Louis Circuit Court is peculiar, and altogether different from the remainder of the circuits. It consists of three judges, who hold special terms for the ordinary transaction of business, and general terms, composed of all three judges, for the revision of the rulings of the judges holding separate or special terms; in other words, an appeal lies from the special to the general term.

The 14th section of the law organizing the St. Louis Circuit Court provides that, in addition to the ordinary power of making rules conferred by the general law, the court may make all rules which its peculiar organization may in its judgment require, different from the ordinary course of practice and necessary to facilitate the transaction of business therein.

By virtue of this provision, the court adopted a series of rules, the 12th of which declared that, from all judgments and decrees rendered or orders made at the special term, any party aggrieved, if he desired to apply to the general term to have the same vacated, reversed, or modified, should, within five days (if the term so long continued, and if not, then before the end of the term) after the rendition of such judgment or decree, or the making of such order, pray for an appeal to said general term, which should be allowed; and if the errors complained of did not appear in the record, then the same should be preserved by exceptions taken at such special term. The 16th rule provides that within five days after any motions shall be overruled or any ruling made at special term, to which a party desires to except, the party excepting to the opinion of the court shall prepare a bill of exceptions, and shall hand the same, or a copy thereof, to the attorney for the opposite party, who shall, within three days thereafter, make objections (if there be any) thereto, in writing, on a separate piece of paper, pointing out particularly the alterations and additions to be made thereto. If the party preparing said bill does not agree to such alterations, then the same shall be settled by the court. If no objections be made to such bill within three days, all objections will be considered as waived.

State ex rel. Rogers v. Hug et al.

It will be observed that, in addition to the ordinary power of making rules conferred by the general law, the St. Louis Circuit Court, owing to its peculiar organization, has the express power conferred of making rules differing from the ordinary course of practice, which may be necessary to facilitate the transaction of business. And this is left to the judgment and discretion of the court. The court acts upon its own judgment, and we know of no right to interfere with its rules or revise its discretion, except in a case where it has abused its authority or violated some law. There is no violation of law here, for the court has acted within the line of the power delegated.

The absolute necessity of some such restriction as prescribed in the rules above referred to is apparent. If the general law concerning exceptions were to be applied to the St. Louis court, it would impede business and delay justice. No appeal can be taken to this court till judgment at general term.

If the party is to have the whole term to write out and file his exceptions, then the cause can not be heard at general term till a subsequent distinct term of the court. This would not be facilitating business, nor is it the intention of the law. But it is enough for this court to know that the power exists; we will not undertake to control the discretion of the Circuit Court.

The writ will be denied. The other judges concur.

STATE *ex rel.* B. W. ROGERS, Appellant, *v.* CHARLES HUG
et al., Respondents.

1. *St. Charles, city of—Engineer—Street opening—Damages, assessment of—City not compelled to pay—Construction of statute.*—The charter of the city of St. Charles (Sess. Acts 1849, p. 272) in effect declared that property should not be used for opening or widening streets till damages assessed in favor of the property owners were paid, but did not provide for the rendition of any judgment, or point out any mode for the collection of damages. Under that provision, the property of appellant was condemned for the opening of a street, and damages were assessed in his favor. On appeal to the Circuit Court from the finding of the jury, appellant obtained an award for a further amount against the city. *Held*, that the statute providing for the issuing of *mandamus* against corporations, requiring them to levy special

State ex rel. Rogers v. Hug et al.

taxes for the payment of judgments outstanding against them where an execution has been unavailing (Gen. Stat. 1865, ch. 161, §§ 77-79), has reference to a common-law judgment, regularly rendered and mutually binding, and not to such an award.

2. *Corporations, city—Opening of streets—Assessment of damages—Payment, title of property before.*—After assessment of damages to property owners for opening of streets, the city may, at her option, on payment of costs, desist from the undertaking and leave parties in *statu quo*. Such assessment does not invest the city with the right of property, nor divest the title of the property-holder till payment of the amount assessed. (City of St. Joseph v. Hamilton, 43 Mo. 282, affirmed.)

Appeal from Sixth District Court.

H. C. Lackland, for appellant.

I. An abandonment of the property after condemnation completed does not affect the right of compensation. (Wilkerson v. Buchanan County, 12 Mo. 328; St. Francois County v. Marks, 14 Mo. 539; St. Francois County v. Peers, 14 Mo. 537; Harrington v. Commissioners Berkshire County, 22 Pick. 263; Hallock v. County of Franklin, 2 Metc. 558; Town of Hampton v. Coffin, 4 N. H. 517; 33 Mo. 440.)

II. The acts of a city are known by its ordinances or other formal declarations of record. The charter of St. Charles (Sess. Acts 1849, p. 270) says "the mayor and councilmen shall have power by ordinance to open, alter, abolish [abandon], widen, extend, and establish streets," etc. But no ordinance or other formal declaration was ever made by the city abandoning this condemned property, and none is pleaded by defendants in their answer. The property is still subject to and bound by the condemnation, and can be neither disposed of nor improved.

III. The payment of the money is not a part of the condemnation proceedings. After the "adequate compensation" is ascertained, the city can take possession whenever it suits its convenience—within a month, a year, or five years, or any other time—by paying the owner the assessed damages. The charter contemplates that the appropriation to public use (that is, the widening of the street) has already been made by ordinance, and the jury and trial are merely for the purpose of ascertaining what compensation (if any) is due to the persons injured by the widening of the street.

Lewis & Bruere, for respondents.

I. The judgment in this case was absolutely null and void. The proceeding was not a common-law one for the vindication of a common-law right, but was purely the creature of statute. The statute creating it did not authorize the entering of any judgment, nor was any law in force empowering the court to render any sort of judgment whatever for coercive effect. There was no jurisdiction for such a purpose. (Sess. Acts 1849, p. 272, §§ 3, 4; *Fitzhugh v. Custer*, 4 Texas, 399; *Latham v. Edgerton*, 9 Cowen, 227.)

II. The provision requiring payment as a precedent condition is a protection both to the individual and the corporation. It saves the former from all danger of having his property appropriated without actual compensation, and it enables the latter, in the event of an assessment beyond its means or disproportioned to the public benefit to be derived, to abandon the contemplated improvement.

WAGNER, Judge, delivered the opinion of the court.

The relator applied for, and the Circuit Court of St. Charles county granted, a writ of *mandamus* against the defendant Hug and others, who were mayor and councilmen of the city of St. Charles, to compel them to levy a special tax to pay off a judgment, which he alleged he had obtained against the said city, and upon which execution had been issued and returned unsatisfied. From the action of the Circuit Court in granting the *mandamus* an appeal was taken to the District Court, where the judgment was reversed, and the case is now brought here.

The proceedings which resulted in the rendition of the supposed judgment grew out of the acts of the city authorities in attempting to condemn certain real estate belonging to the relator. By the act incorporating the city of St. Charles (Sess. Acts, 1849, p. 272), power is given the mayor and councilmen to regulate, pave, and improve the streets, and to extend, open, or widen streets, avenues, lanes, or alleys, upon making the persons injured thereby adequate compensation; and for the purpose of ascertaining the amount of injury or damage, the mayor is authorized to cause a

jury to be summoned and sworn to assess the damages. When any assessment of damages is made, either the city or any person interested feeling himself aggrieved by such assessment is allowed to appeal to the Circuit Court. Whenever any such appeal is taken to the Circuit Court, the same is to be tried as other issues in said court; and in case damages are assessed to any person by a jury or court, the same are required to be paid out of the city treasury before the property of such person can be taken for public use. (Art. VI, §§ 2-4.)

In pursuance of the above authority, the city instituted proceedings to condemn a strip of ten feet off from the end of the relator's lot on Clark street, for the purpose of making a pavement. The mayor caused a jury to be impaneled, who assessed damages, and from that assessment the relator appealed to the Circuit Court, where he obtained an award for seven hundred and fifty dollars; and this is the supposed judgment upon which this suit is founded. After the assessment in the Circuit Court, the city abandoned the enterprise, refused to pay for the property, and the relator is still in quiet and undisturbed possession thereof.

The statute makes provision for the issuance of *mandamus* against corporations, requiring them to levy special taxes for the payment of judgments outstanding against them where an execution has been unavailing. But this not such a judgment as is contemplated in the act. The law has reference to a common-law judgment, regularly rendered and mutually binding. The charter does not provide for the rendition of a judgment, nor is any mode pointed out for the collection of the damages in the case; it is only declared that the property shall not be taken till the damages are paid. This is the security which the property-holder has against the appropriation of his estate.

It was doubtless seen that juries might award damages so exaggerated and enormous that the city would be incapable of prosecuting her designs, and wholly unable to pay for the property at the assessed price. So, upon the payment of the costs, she might desist if she would, and the parties would be left in the same situation that they were in before proceedings commenced.

Kerr v. Bell.

The simple act of assessment does not invest the city with the right of property, nor does it divest the title of the property-holder. Till payment made according to the provisions of the charter, there is no transference of title in the city—no divestiture from the citizen. The same question was recently before this court, upon a provision of the charter of the city of St. Joseph, which is precisely similar to the one we are now construing; and we held that after the assessment the city had the right to abandon, and that, if she refused to pay for the property and appropriate it, she would not be liable. (*City of St. Joseph v. Hamilton et al.*, 43 Mo. 282.)

That case is decisive and controlling authority here. This view of the case effectually disposes of this controversy, and renders it unnecessary to notice other matters which have been discussed.

Judgment affirmed. The other judges concur.

WILLIAM KERR, Defendant in Error, v. PATTERSON B. BELL,
Plaintiff in Error.

1. *Practice, Civil—Defect of parties, how taken advantage of—Demurrer.*—It is too late to urge as ground of error, in this court, that the petition is defective by reason of non-joinder of parties. Defendant, to avail himself of such defect, should resort to demurrer. By failing to do so, he waives the objection. (Gen. Stat. 1865, ch. 165, §§ 6-10.)
2. *Practice, Civil—Pleadings amended to conform to evidence, when.*—Where plaintiff's petition stated that certain real estate in controversy was paid for in cash, and the evidence showed payment by conveyance of other real estate, the court properly allowed plaintiff to amend his petition so as to make it conformable to the facts proved. (Gen. Stat. 1865, ch. 168, § 3; 42 Mo. 101.)
3. *Contracts—Infants—What contracts void and what voidable.*—The contracts of infants for necessities, such as shelter, food, and clothing proper for their station, and such other means of support and education as may be requisite for them, are valid and obligatory. But, generally, their promises in any business transaction, though not absolutely void, are voidable by them. And the contract of partnership may be made by an infant for his own benefit, subject to his right to avoid it when he comes of age.
4. *Contracts—Rescission—Infants—Consideration.*—An infant vendor may recover back his property, either real or personal; but in such a case he must refund what he has received. There can be no such right of recovery so long as any part of the consideration is withheld.

 Kerr v. Bell.

5. *Contracts—Real estate, sale of—What acts an abandonment of.*—Where, after the sale of certain land, the vendor received back the possession of it, rented it out, enjoyed the rents and profits, exercised exclusive and absolute ownership over it, advertised it for sale, and had the title vested in himself, such acts will be held to be an abandonment by him of the sale

Error to Sixth District Court.

Henderson, Dyer & Murray, for plaintiff in error.

I. The Circuit Court erred in causing the petition to be so amended as to change the issues, after the evidence had been closed, and in rendering a judgment upon the allegations of the petition, without an opportunity for defense.

II. To entitle the plaintiff to recover at all the contract must be rescinded. If there was a rescission or an abandonment of the contract, John Kerr must be a party to this proceeding—either plaintiff or defendant. (*Teed v. Elworthy*, 14 East. 210; *Goode v. Harrison*, 5 Barn. & Ald. 150; *Thomason v. Frere*, 10 East. 418; *Murray v. Murray*, 15 Johns. 70; *Peters v. Davies*, 7 Mass. 257; *Wamsley v. Lindenberger*, 2 Rand., Va., 478.)

III. If the court rescinds the contract in this proceeding because of infancy, the parties should be put in *statu quo*, which in this case can not be done. (3 Kent's Com. 33; 9 Johns. 470; 8 Greenl. 170; 17 Mass. 197; 3 N. H. 64; 7 Conn. 307; 15 Serg. & Rawle, 137; 19 Johns. 226; 18 Mart., La., 48; 2 Peters, S. C., 195; 5 Peters, S. C., 529.)

IV. It is doubtful whether the contract of an infant, made with consent of his guardian, should be set aside on the ground of infancy at all; and authorities show that money paid by an infant in execution of a contract should not be recovered back in the absence of fraud. (*Stone v. Dennison*, 13 Pick. 1; *Breed v. Judd*, 1 Gray, 450; *Holmes v. Blogg*, 8 Taunt. 508; 5 N. H. 345; 4 Blackf. 337; *Goode v. Harrison*, 5 Barn. & Ald. 150.)

V. If an infant puts his funds into a joint scheme with others, any one of whom may bind the firm, he can not recover back money paid out by his partners. If the infant can avoid any contract, it is that by which he entered the copartnership. He can not avoid a contract made by his partners with third persons,

Kerr v. Bell.

and much less should he be able to avoid them without making his copartners parties.

E. A. Lewis, Ewing & Holliday, and Howell & Campbell, for defendant in error.

I. The variance in the amended petition was not material. (Gen. Stat. 1865, p. 669, § 3.)

II. Many cases are reported in which infants have been joint contractors with adults, and in none of them was the right of disaffirmance ever questioned on that ground. (Smith v. Evans, 5 Humph. 27; Hillyer v. Bennett, 3 Edw. Ch. 222.)

III. This was a joint purchase of real estate, and nothing else. The terms of the purchase had no reference to the carrying on of a partnership together, with a communion of profits and losses. That might have been their intention; but, if so, it was wholly independent of the transaction with the defendant. (Grace v. Hale, 2 Humph. 27; Hill v. Anderson, 5 Smedes & Mar. 216; Smith v. Evans, 5 Humph. 70; Hillyer v. Bennett, 3 Edw. Ch. 222; Tyler on Infancy, etc., 75.)

IV. The minor was entitled to receive back all that he had paid. (Tyler on Infancy, etc., 75; 1 Am. Lead. Cas. 115-6.)

V. If, from anything in the nature of the case, it appear that the elder Kerr should have been made a party to the suit, that point has been waived by the defendant in his failure to demur for defect of parties. (Gen. Stat. 1865, p. 658, §§ 6, 10.)

VI. The whole case is settled by the defendant's acceptance of the surrender tendered by the plaintiff, and his subsequent acts confirming the mutual abandonment of the contract with plaintiff. The abandonment is executed on the part of the plaintiff, and the defendant, while enjoying its advantages in the possession and renting of the farm, yet refuses to perform his share. He can not now be permitted to recede from such an abandonment on any terms.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally instituted in Pike county Circuit Court, asking for a rescission or disaffirmance of a con-

Kerr v. Bell.

tract, and to recover the consideration paid on the contract sought to be rescinded. The ground on which the claim to relief was based by the plaintiff was that he was a minor when he entered into the contract, and that the same was subsequently abandoned by the mutual consent of both parties.

It appears that in the year 1859 William Kerr, the plaintiff, together with John Kerr, his brother, purchased a tract of land from defendant Bell, at the price of \$11,000, payable one-third cash, and the remainder in two equal annual installments. The first payment was made, in part, by the conveyance of a house and lot in the town of Ashley, by one Wm. H. Purse, to defendant. The legal title thereof was in Purse, but the equitable ownership was in the Kerr brothers, at the estimated value of \$3,500. The residue of the first payment was made in cash. The Kerrs moved upon and took possession of the farm and occupied it until the beginning of the year 1862. Defendant, at the same time, took possession of the Ashley house, and was still in possession at the commencement of the suit.

Notes and a title bond in the usual forms were delivered by the parties, respectively, in the original transaction. William Kerr, the plaintiff, was a minor at the time of the purchase, his brother and co-purchaser being of mature age. Plaintiff reached his majority on the 30th day of May, 1862. A short time after that date he called on the defendant and disaffirmed the entire transaction, delivering to defendant the key of the dwelling-house situated on the farm, and demanding to be restored to his original condition by a reconveyance of one undivided half of the Ashley house and half the money paid, and to be released from his obligation on the notes given for the residue of the purchase money. The defendant accepted the key, took possession of and rented out the farm, has ever since been in peaceable possession, enjoying its rents and profits, and subsequently advertised it for sale. Afterwards, however, he repudiated the disaffirmance, and sued the plaintiff and his brother on the notes given for the purchase money. In that suit he seems to have been defeated. In this condition of things, plaintiff instituted this suit in enforcement of the disaffirmance, and to compel the restoration demanded. Such

Kerr v. Bell.

are the facts as substantially disclosed by the evidence and the finding of the Circuit Court. At the hearing, the Circuit Court gave judgment for the plaintiff, which was affirmed by the District Court, and the defendant sued out his writ of error.

It is urged as a ground of error, in this court, that the petition was defective, and that the elder Kerr should have been made a party. If that were true it is unavailing now; it was a matter that appeared on the face of the petition, and if the defendant desired to take advantage of it he should have resorted to his demurrer. By failing to do so, he waived the objection. (Gen. Stat. 1865, ch. 165, §§ 6-10.) The original petition, instead of mentioning the Ashley property as part of the first payment, stated that that payment was made in cash. When the evidence had been heard on the trial, plaintiff obtained leave to amend his petition, so as to make it conformable to the facts proved. The amendment was immediately made, the defendant excepting to the leave granted. I can perceive no just ground for complaint in allowing the amendment. The merits or substantial issues were not changed, and the character of the defense was in no degree altered. The plaintiff had the right to make his pleading conform to the facts proved, and the court did not unwisely exercise its discretion. (Gen. Stat. 1865, ch. 168, § 3; Wellman v. Dismukes, 42 Mo. 101.)

It is contended that the brothers Kerr purchased the land in partnership, and that there can be no rescission, because the plaintiff can not place the defendant in *statu quo*; that plaintiff's disaffirmance would leave a contract with the elder Kerr different from that which was originally made, and would operate as an entire change of the condition and position of the parties. When the witnesses used the word "partnership," it is very doubtful whether they comprehended its legal import. But take them at their word and admit that it was a partnership adventure, still I apprehend the solution of the question is not difficult. It may be stated as a general rule that the law considers infants under twenty-one years of age as disqualified for the transaction of business. Their contracts or promises for necessities, however, such as shelter, food, clothing proper for their station, and such

Kerr v. Bell.

other means of support and education as may be requisite for them, are valid and obligatory, because it is for their interest that they should be able to bind themselves for things indispensable for their support and comfort, and if this power were denied them they would suffer for the want of them. (But when an infant makes a promise in any business transaction, though not absolutely void, it is voidable by him. And the contract of partnership is no exception to this rule; it is like all other transactions, and may be made by an infant, for his own benefit, subject to his right to avoid it when he becomes of age. If a contract be made with a firm, one of the members being an infant, and repudiating his own liability, it has been doubted whether the contract can afterwards be treated as a contract made with the other partners. (Sto. on Part. § 255.) Mr. Parsons gives it as his decided opinion that it may be so treated. (Pars. Part. 22.) The doctrine is very clear that an infant vendor may recover back his property, either real or personal, but in such cases he must refund what he has received. Such has been the established principle since the decision in the leading case of *Stafford v. Roof* (9 Cow. 626). If he has received property and paid for it, he can not avoid the contract and recover the money paid without re-delivering the property.) And it has been held that if the contract be for the purchase of property by the infant, and he perform labor in part payment of the price, and then disaffirm the contract without having received anything under it, he may recover for work on a *quantum meruit*. (*Medbury v. Watson*, 7 Hill, 110.) (The rule is thus summed up in a work of merit: "The only reason why a rescission of a contract in any case gives a right to recover what has passed by the contract, is that the consideration of such transfer has totally failed; and unless the party is restored to the situation which he was in before, the consideration has not wholly failed as to him. • In other words, there can be no avoidance by parol, so as to give a right to recover back property once lawfully transferred and vested so long as any part of the consideration is withheld." (1 Am. Lead. Cas. 116.)

Now, in the present case, no part of the consideration was

withheld. There was a complete restoration of the whole property, and a most unqualified acceptance of it. As the plaintiff's right to rescind and disaffirm can not be disputed, and as the defendant received all his property back, it is not easy to see on what grounds defendant can retain possession of the notes and the property that he obtained in exchange.

In the decree of the court below the Circuit Judge adjusted the equities between the parties, and set off the rents, and made allowances for whatever waste was committed. Certainly nothing could be more just and equitable, and there is nothing left for complaint. We will not enter into an examination of the relations subsisting between the defendant and the elder Kerr. When that question is presented in a legal form it will be time enough to consider it. Aside from the opinion arrived at above, the plaintiff's right to recover in this suit might be safely placed upon the ground of abandonment. The defendant received the possession of the farm, rented it out, enjoyed the rents and profits, exercised exclusive and absolute ownership over it, advertised it for sale, and had the legal title vested in him. In view of these facts it would be monstrous to say that he might also hold and retain the consideration which passed from the plaintiff.

The judgment will be affirmed. The other judges concur.

JOHN L. BERNECKER, Respondent, *v.* WENDELIN MILLER and
LOUIS KOEHLER, Appellants.

1. *Landlord and tenant — Unlawful detainer — Appeal bond — Damages.* — The defendant, in an action before a justice of the peace for unlawful detainer, appealed from a judgment rendered against him, and gave a bond conditioned that he should prosecute the appeal with effect and without delay, and afterward failed to prosecute the appeal, and the appeal was dismissed, but no judgment was rendered against him in the appellate court. Plaintiff then sued for damages on the bond, alleging a breach of the above condition, claiming rents and profits as damages. *Held*, that the condition above stated having been broken, the liability to a judgment for the penalty was complete; and that, if the plaintiff was deprived of the use of the property, or of his right to restitution by the appeal, the damage arising from such deprivation was the result of the appeal, and, the condition of the bond being broken, the obligee would be entitled to execution for such damages.

Bernecker v. Miller.

Appeal from St. Louis Circuit Court.

The facts are stated in the opinion of the court.

P. C. Morehead, for appellants.

I. On the appeal bond read in evidence by the plaintiff, together with the allegations of the petition, the plaintiff could not recover the rents and profits accruing before the justice.

II. The only breach of the conditions of the bond is that the defendant failed to prosecute the appeal with effect. In a suit on a recognizance or appeal bond, to authorize a recovery, proper breaches should be assigned, and the resulting damages alleged and proved. There is no breach alleged for non-payment of rents and profits, nor is there any proof of damages resulting from a failure to prosecute with effect, even if such had been the case and was a proper breach.

R. S. McDonald, for respondent.

BLISS, Judge, delivered the opinion of the court.

Respondent obtained a judgment against defendant Miller in an action for unlawful detainer, before John Bray, justice of the peace, for dispossession, rents, etc. He made affidavit and filed bond for appeal; but, failing to bring up his transcript, the plaintiff produced it and moved to dismiss the appeal, which was done, and the action of the court was sustained by this court. (*Bernecker v. Miller*, 37 Mo. 498). Afterward the justice issued a writ of restitution and execution, for damages and costs, and for rents and profits. Defendant Koehler paid \$77.55 upon the execution, which nearly covered the money demand on its face, but there was no payment of rents, etc., and the return of the sheriff showed that the amount could not be made of Miller. The plaintiff then brings this action upon the appeal bond executed by both the defendants, and alleges as breach that Miller failed to prosecute his appeal with effect, that the appeal was dismissed, etc. The Circuit Court gave him judgment for \$800, the penalty of the bond, with execution for the damages found for the plaintiff, amounting to \$273.70, and for costs; and defendants appeal to general term, and thence to this court.

withheld. There was a complete restoration of the whole property, and a most unqualified acceptance of it. As the plaintiff's right to rescind and disaffirm can not be disputed, and as the defendant received all his property back, it is not easy to see on what grounds defendant can retain possession of the notes and the property that he obtained in exchange.

In the decree of the court below the Circuit Judge adjusted the equities between the parties, and set off the rents, and made allowances for whatever waste was committed. Certainly nothing could be more just and equitable, and there is nothing left for complaint. We will not enter into an examination of the relations subsisting between the defendant and the elder Kerr. When that question is presented in a legal form it will be time enough to consider it. Aside from the opinion arrived at above, the plaintiff's right to recover in this suit might be safely placed upon the ground of abandonment. The defendant received the possession of the farm, rented it out, enjoyed the rents and profits, exercised exclusive and absolute ownership over it, advertised it for sale, and had the legal title vested in him. In view of these facts it would be monstrous to say that he might also hold and retain the consideration which passed from the plaintiff.

The judgment will be affirmed. The other judges concur.

JOHN L. BERNECKER, Respondent, *v.* WENDELIN MILLER and
LOUIS KOEHLER, Appellants.

1. *Landlord and tenant—Unlawful detainer—Appeal bond—Damages.*—The defendant, in an action before a justice of the peace for unlawful detainer, appealed from a judgment rendered against him, and gave a bond conditioned that he should prosecute the appeal with effect and without delay, and afterward failed to prosecute the appeal, and the appeal was dismissed, but no judgment was rendered against him in the appellate court. Plaintiff then sued for damages on the bond, alleging a breach of the above condition, claiming rents and profits as damages. *Held*, that the condition above stated having been broken, the liability to a judgment for the penalty was complete; and that, if the plaintiff was deprived of the use of the property, or of his right to restitution by the appeal, the damage arising from such deprivation was the result of the appeal, and, the condition of the bond being broken, the obligee would be entitled to execution for such damages.

Appeal from St. Louis Circuit Court.

The facts are stated in the opinion of the court.

P. C. Morehead, for appellants.

I. On the appeal bond read in evidence by the plaintiff, together with the allegations of the petition, the plaintiff could not recover the rents and profits accruing before the justice.

II. The only breach of the conditions of the bond is that the defendant failed to prosecute the appeal with effect. In a suit on a recognizance or appeal bond, to authorize a recovery, proper breaches should be assigned, and the resulting damages alleged and proved. There is no breach alleged for non-payment of rents and profits, nor is there any proof of damages resulting from a failure to prosecute with effect, even if such had been the case and was a proper breach.

R. S. McDonald, for respondent.

BLISS, Judge, delivered the opinion of the court.

Respondent obtained a judgment against defendant Miller in an action for unlawful detainer, before John Bray, justice of the peace, for dispossession, rents, etc. He made affidavit and filed bond for appeal; but, failing to bring up his transcript, the plaintiff produced it and moved to dismiss the appeal, which was done, and the action of the court was sustained by this court. (*Bernecker v. Miller*, 37 Mo. 498). Afterward the justice issued a writ of restitution and execution, for damages and costs, and for rents and profits. Defendant Koehler paid \$77.55 upon the execution, which nearly covered the money demand on its face, but there was no payment of rents, etc., and the return of the sheriff showed that the amount could not be made of Miller. The plaintiff then brings this action upon the appeal bond executed by both the defendants, and alleges as breach that Miller failed to prosecute his appeal with effect, that the appeal was dismissed, etc. The Circuit Court gave him judgment for \$800, the penalty of the bond, with execution for the damages found for the plaintiff, amounting to \$273.70, and for costs; and defendants appeal to general term, and thence to this court.

The declarations of law asked by defendants, the facts having been submitted to the court, were, first, that "upon the bond read in evidence by the plaintiff he can not recover the rents and profits, damages and costs, recovered on the trial before Justice Bray;" and, second, that "on the petition, answer, and evidence, the plaintiff can not recover;" both of which were refused by the court.

As there was no judgment in this case in the appellate court for "rents and profits, damages and costs," the appeal having been simply dismissed, the defendants claim—and by these declarations raise the question—that they are not liable for such rents, etc., upon the bond, and that the allegations of the petition that Miller failed to prosecute his appeal with effect, that it was dismissed, etc., do not show such a breach as will cover this liability.

There are several conditions to the obligation of the bond: 1. That the appeal shall be prosecuted with effect and without delay. 2. That appellant shall not commit waste or damage. 3. That he shall pay the rents and profits, etc., that may be adjudged against him. 4. That he shall otherwise abide by the judgment of the appellate court. The plaintiff relies upon the breach of the first condition. The appeal was not prosecuted with effect, for no steps were taken by Miller, after filing the bond, to perfect or prosecute his appeal. This condition having been broken, the liability to a judgment for the penalty is complete, and the only question is one of damages. Are the defendants liable as well for rents and profits, not having prosecuted their appeal, as they clearly would have been by the express terms of the bond, had judgment been rendered in the Circuit Court against the appellant for such rents, etc.? This question is answered if we will consider whether the plaintiff was deprived of the use of the property, of his right to restitution, by the appeal. If so, the damage arising from such deprivation is the result of the appeal and of giving the appeal bond; and, the condition of the bond being broken, the obligee should be entitled to execution for such damages.

Judgment is affirmed. The other judges concur.

State ex rel. Attorney-General et al. v. Davis.

STATE *ex rel.* ATTORNEY-GENERAL and L. BROWN, Petitioners,
v. L. H. DAVIS, Respondent.

1. *Office—Acts of 1865 and 1868, validity of—Circuit Attorney—Vacating ordinance, tenure of.*—The law providing for the election of circuit attorneys in 1866, and every four years thereafter (Gen. Stat. 1865, ch. 18, § 6), was void only so far as concerned officers holding under the vacating ordinance. (Gen. Stat. 1865, p. 47; *vide* 38 Mo. 419; 41 Mo. 58.) And where a circuit attorney was appointed and claimed his tenure of office, not under the vacating ordinance, but under the act of 1866, he could not hold as against a circuit attorney elected to the office at the general election of 1868. In point of legal conformity and principle, the acts providing respectively for elections in 1866 and 1868 are equally valid as to officers not holding under the vacating ordinance.
2. *Legislative office in the United States—Incumbent has no vested right in.*—In the United States, offices created by the Legislature are not held by grant or contract; nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact.

Application for writ of quo warranto.

H. B. Johnson, and L. Brown, for petitioner.

L. H. Davis, respondent, *pro se*.

WAGNER, Judge, delivered the opinion of the court.

The attorney-general applies for a writ in the nature of a *quo warranto*, and suggests that on the 9th day of March, 1867, Louis Brown was duly appointed and commissioned as circuit attorney within and for the tenth judicial circuit of this State; that by virtue of said commission and the statutes in such cases made and provided, the said Brown is entitled to the said office until the first Tuesday after the first Monday in November, 1870; that upon the said Brown receiving his commission, he legally qualified thereunder, and thereupon assumed the duties of the office. The information then avers that on the 18th day of January, 1869, the defendant, Davis, unlawfully and illegally usurped and intruded into and exercised the duties of said office, and prays for judgment of ouster.

The defendant, for answer, states that he was duly elected to said office for the term of four years, at the general election held

State ex rel. Attorney-General et al. v. Davis.

in the year 1868, in November, by the qualified voters of the said judicial circuit, which election was held on the day prescribed by law for the election of circuit attorneys throughout the State; that at said election defendant received a majority of the votes cast for said office, and was duly declared elected; and on the 29th of December, 1868, was duly commissioned as circuit attorney by the governor; that, having been so elected and commissioned, he duly qualified according to law on the 18th day of January, 1869, and entered upon the discharge of the duties of said office.

To this answer a demurrer was interposed, assigning as a ground of objection that the act of the Legislature providing for the election of circuit attorneys, in the year 1868, was unconstitutional and void.

There is no difficulty in this case. Ever since the office of circuit attorney was made elective in this State, the period or duration of the term of office has always been fixed at four years.

In 1864 there was a regular election for circuit attorneys, and the term of the officers elected in that year expired in 1868. The convention subsequently vacated all the occupants of the office, and provided that appointments should be made by the executive till the expiration of the regular term. In the revision of the statutes, the revisors undertook to change the time for the election of circuit attorneys, and declared that they should all be elected at the general election in 1866, and every four years thereafter. A majority of this court, in an advisory opinion to the governor, held that this law was void so far as concerned officers holding under the vacating ordinance; that the ordinance being organic in its nature, and on account of the peculiar language used in it, the Legislature was incompetent to abridge the term. But it was distinctly announced that the office of circuit attorney was not a constitutional office, and was ordinarily subject to be controlled and regulated by the Legislature. (38 Mo. 419.)

In the case of *The State ex rel. Kreiter v. Straat* (41 Mo. 58), the validity of the law of 1866 was expressly affirmed as to all officers except those who held under the vacating ordinance.

State ex rel. Attorney-General et al. v. Davis.

The Legislature, at its adjourned session in 1868, amended the general statutes, and restored the time for electing circuit attorneys to the regular period in November, 1868, at which time the defendant was elected in pursuance of law. Brown never held under the vacating ordinance, and his title was not within its provisions. He occupied the same position as did Straat, in the case in 41 Mo. referred to above. If the position urged by the counsel for the State is correct, it wholly defeats and destroys the claim of Brown, for he seeks to hold under the tenure prescribed by the act of 1866; and if the Legislature did not possess the power to alter the law of 1866, and require the election to be held in 1868, they did not have the power to change the law of 1864, and provide for an election in 1866. In point of legal conformity and principle, the acts of 1866 and 1868 stand upon the same basis; both are equally valid, with the exception heretofore adverted to, as to those holding under the vacating ordinance. But the whole doctrine upon which the case is placed for the plaintiff is without support.

It proceeds upon the theory that a person in the possession of a public office created by the Legislature has a vested interest, a private right of property, in it. This is not true of offices of this description in this country; they are held neither by grant nor contract. A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American States; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact. (3 Kent's Com., 11th ed., 454, note c; 2 Washb. on Real Prop. 250; Primm v. Carondelet, 23 Mo. 22; Butler v. Pennsylvania, 10 How. 415; Smith v. The Mayor, 37 N. Y. 518; Conner v. The Mayor, 1 Seld. 285; People v. Warner, 7 Hill, 81, 2 Den. 272; Baker v. Utica, 19 N. Y. 326; Lynch v. Mayor, 25 Wend. 680; Devoy v. Mayor, 39 Barb. 169; Canniff v. Mayor, 4 E. D. Smith, 430.)

The writ will be denied. The other judges concur.

Waddingham's Ex'rs v. Loker et al.

WADDINGHAM'S EXECUTORS, Appellants, v. LOKER, DEAN *et al.*,
Respondents.

1. *Equity—Conveyances, fraudulent—Secret trusts.*—The law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands.
2. *Equity—Voluntary trusts—Creditors—Agency.*—In a suit to subject certain stocks held by the widow and children of A. to the payment of his obligations, the mere fact that at his solicitation B. had purchased and held the same for the benefit of A.'s family, and that, as agent for B., A. had examined the books of the company and looked after the general management of the stocks, and, in his capacity as agent, had deposited dividends arising from the stocks, will not make such stocks liable for his debts, if it further appears that the stocks were not procured with his money or credit, and that he had no ownership or control of it except as agent of B.
3. *Equity—Fraud, what circumstances sufficient to establish—Evidence.*—In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud.

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, for appellants.

Thomas T. Gantt, for respondents.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs filed their petition in the Circuit Court, the general object and purpose of which was to subject certain stocks held by the widow and daughters of George W. Jencks to the payment of debts owing by him. The petition set out and described a judgment rendered in favor of Waddingham against Jencks while both were living, a revival of that judgment, partial payments, and the death of both parties; and proceeded to state, as ground of relief and for equitable interposition, that the stock in question had been originally purchased with the money and means of Jencks, and given to his wife and daughter, in fraud of the rights of his creditors.

The answer denied that the stock was in any manner, or in any sense or degree, purchased or acquired by the means or credit of Jencks. It sets forth the whole history of the purchase of the stock and the circumstances attending it. It states that when the Transfer Company was formed, the stock of which is in controversy in this suit, Jencks was an employee of the Ohio and Mississippi Railroad Company; that he suggested to the defendant Loker, who was an old and intimate friend, that the stock of the company afforded an excellent opportunity for good investment, and that it could not fail to be profitable; that Jencks urged Loker to subscribe on his own account to the stock, and also urged him to take a number of shares for the benefit of the wife and daughters of Jencks, assuring him that in his judgment the only money he would have to pay on account of the subscription for the wife and daughters of Jencks would be the first installment, that the dividends would speedily pay off the residue of the subscription and make the stock good, and refund to Loker the money he was requested to advance. The proposition was to make the last subscription in the name of "Geo. H. Loker, trustee;" to hold the stock in his own name, as security, until he was fully reimbursed, and then to transfer it to the wife and daughters of Jencks. Loker was a banker and possessed of wealth, and was about using his means for the improvement of his real estate, and he regarded Jencks' proposals as visionary, and refused to accede to them. Jencks was wholly insolvent, and supported his family on a salary which he received from the railroad company. At last, owing to the importunity of Jencks, and his evident distress at the penniless condition in which his family would be placed in the event of his death, Loker, on account of personal friendship, was induced to take the risk of making a subscription in his own name, as trustee, and to advance the cash payment; if the adventure was unsuccessful, to sell with as little loss as possible; and if Jencks' anticipations were realized, then, after paying himself and ten per cent. interest, to transfer the stock to Mrs. Jencks and her daughters. He subscribed accordingly for fifty shares, nominally valued at \$5,000, and advanced in cash, as a first payment, \$2,000. The stock proved extraordinarily

remunerative. The dividends first canceled Loker's stock note for the deferred payment, then reimbursed him his cash installment and interest, and continued so profitable that the company expanded the stock, and what was originally fifty shares grew into five hundred, and still continued to pay handsome dividends. In process of time the two daughters of Jencks were married, and Loker thereupon conveyed two hundred of the shares to each of the daughters respectively, and the remaining one hundred shares to Mrs. Jencks, the widow. At the hearing in the court below, the bill was dismissed as containing no equity, and the plaintiffs have appealed. A large mass of evidence was introduced, and, after a careful perusal of it, I must say that the transaction, as narrated in the answer, seems to be well sustained by the proofs. It is a rule well known and established that the law will not permit a man to withdraw his property from his creditors. Justice must prevail before generosity. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands. Did the evidence show that Jencks merely applied to Loker to subscribe for the stock, for the purpose of having it placed in his name, as a cover for fraud, while Jencks furnished the money to pay for the same, and retained a secret use, there would be no difficulty in reaching the stock and making it liable for Jencks' debts. But the testimony of Loker is decisive, and stands uncontradicted, that the stock was not procured either with the money or credit of Jencks. It plainly appears that Jencks had no ownership in it; nor had he any control over it, only so far as Loker chose to invest him with that control. Jencks did attend the meetings of the board of directors, and attended to the management of the stock, but it was because he was lawfully authorized thereto by written power of attorney from Loker, and afterward as the duly accredited agent of his daughters. No creditor of Jencks suffered to the amount of a farthing in consequence of the purchase of the stock; for neither

his money, credit, nor labor contributed in the slightest degree toward its acquisition. It is not shown that Jencks made any promise to Loker to be responsible or to reimburse him, and it is unquestionably evident that Loker did not act from any notion of Jencks' responsibility, for Jencks was a ruined man, hopelessly insolvent, and barely able to make a subsistence for his family. That his views were consulted, and to a certain extent deferred to, may be admitted; but they were only advisory, and had no binding effect upon Loker. The assumption that he assumed ownership of the stock, and had absolute power over and could require Loker to make such disposition of it as he desired, is unfounded; for Loker states emphatically that had Jencks applied to have the stock transferred to him he would not have complied with the request, and that in the distribution that was made of the stock Jencks had no hand in the matter, but that it was exclusively his own work. The subscription of the stock by Loker was purely voluntary, made from generous motives, as an act of friendship; and had the adventure miscarried or proved unsuccessful, he would have had no legal recourse on Jencks to make good his loss. So, after it was a success, and turned out to be an almost unexampled speculation, when we take into account the smallness of the investment, had Loker seen proper to hold on to the stock as his private property, there is nothing disclosed which would have prevented him from doing so. No consideration had passed to him, and there was nothing on which to base a legal obligation. It is apparent that he was bound in the forum of conscience, but the law does not enforce mere moral or ethical duties. Had he suffered his avarice to override his acts of generosity, and committed such a wrong, he would have branded himself as a dishonored and dishonest man, but it could hardly be said that he would have incurred any legal liability. Perhaps he deserves no credit for acting honestly, but it would be a great and grievous wrong to turn his bounty from its just and rightful recipients and place it in the hands of strangers. There is nothing in the case which in the least militates against or impairs the view here taken.

The acts of Jencks in examining the books and watching the

City of St. Louis, to the use of Rotchford, v. De Noue et al.

general management of the stock are entirely consistent with his character of agent and attorney. Much stress is laid upon the fact of his depositing large sums of money, which it is argued arose out of dividends, and that he used this money as his own. How he used this money I do not know, nor does the record enable me to form an opinion. It is shown that the deposits were made in his name as agent, and, if he did use it, I am unable to see that the plaintiffs had any particular concern in it. Loker and the beneficiaries of the stock might have complained, but if they made no objection the plaintiffs could not do it for them.

It is also contended that the stock ought to be subjected to the payment of the debt by virtue of the doctrine of powers; that where a debtor, having a general power to appoint property which he never owned, exercises that power in favor of volunteers, the property in the hands of such volunteers is burdened with the debts of the appointor if it be necessary for the satisfaction of them. But here it does not appear that Jencks had any power of appointment; the evidence is expressly to the contrary. In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud. If there was anything to impugn or impeach the fairness of the transaction, the evidence most signally fails to show it. After a review of the whole case, I have not seen anything that did not consist with perfect fairness and honesty.

Judgment affirmed. The other judges concur.

CITY OF ST. LOUIS, TO THE USE OF ROTCHFORD, Plaintiff in Error,
v. LUDOVIC DE NOUE *et al.*, Defendants in Error.

1. *Revenue—Sewers—Special tax bills—Mistake in name of owner does not vitiate—Construction of statute.*—An omission or mistake in the tax bill regarding the name of the true owner of property against which a tax is levied, under section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1867, pp. 75-6), does not vitiate the bill. The requirement of the statute

City of St. Louis, to the use of Rotchford, v. De Nove et al.

making it the duty of the engineer to insert in the bill the name of the owner of the special lots assessed, is directory merely. But the rights of the owner can not be affected by such error until he has had his day in court.

2. *Revenue—Special tax bills, judgment on, how limited.*—In suits brought on special tax bills, under the provisions of section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1867, pp. 75-6), judgment should be limited to the property and its owners. If not, it is erroneous; and a personal judgment against the parties to a deed of trust on certain real estate for taxes assessed against it is unwarranted, although such parties may have been properly joined in the suit, as having an interest in the property covered by the tax lien.

Error to St. Louis Circuit Court.

Thomas Grace, for plaintiff in error.

I. The intention of the law evidently is to make the cost of this class of work a direct charge upon the property itself. The engineer is directed to issue his tax bills against the ground, not against the owner of the ground; and when the assessment is made against the ground, the law then says that the owner shall pay it. (*Holland v. Anderson*, 40 Mo. 600.)

II. The provision in the charter that the engineer shall make out his tax bills against each lot, in the name of the owner thereof, is directory in its nature. It is a provision intended to be for the benefit of the contractor, not of the property owner. It is a guide to the contractor to the person who owns the ground and who should pay him. In the general revenue law, lands are required to be listed in the name of the owner, in order to apprise the owner, at the different stages of the collector's proceeding to collect the tax, that the lands have been assessed, and are advertised as delinquent and about to be sold for non-payment of taxes. The collector does not summon the delinquent tax-payers by personal service, or afford them a day in court to make a defense, but proceeds to divest the ownership by constructive notice. But under the city charter the proceedings are by ordinary process of law, and any defendant, whether named in the tax bill or not, may show to the court that he is not an owner nor interested in the land, and therefore not a necessary party defendant. (*Blackw. on Tax* Tit. 173; *Wheeler v. Anthony*, 10 Wend. 346; *Noble v. City of Indianapolis*, 16 Ind. 506; 20 Pick. 418.)

City of St. Louis, to the use of Rotchford, v. De Noue et al.

Krum, Decker & Krum, for defendants in error.

I. To create a charge against the property, and to give the plaintiff a cause of action, the statute must have been followed with strictness. (*Cooms v. Warren*, 34 Me. 89; *Carmichael v. Aikin's Heirs*, 13 La. 205; *Yenda v. Wheeler*, 9 Texas, 408.)

II. Ludovic De Noue is not the owner in the sense of the statute.

III. While a personal judgment might be rendered against Madame De Noue as owner (if the tax bill conforms to the statute), and a special judgment be rendered against the realty, yet a general judgment against all the defendants is manifestly wrong. (*Ruggles et al. v. Collier*, 43 Mo. 353.)

CURRIER, Judge, delivered the opinion of the court.

This suit is prosecuted to recover the amount of a special tax against the land described in the petition, to defray in part the cost of constructing a sewer in the sewer district where the land is situated. The petition alleges that the land assessed is owned in fee by defendant E. B. H. De Noue, wife of L. De Noue, another defendant, subject to the rights of her husband acquired in virtue of their intermarriage; that the other defendants were interested in the property, De Noue and wife having conveyed it to two of them in trust to secure an indebtedness to the remaining defendant. The answer admits the ownership of E. B. H. De Noue and her intermarriage with L. De Noue, but denies that the property is subject to any rights therein of the latter, and denies that the tax bill sued on was made out in the name of the owner of the lot.

At the trial, which was by the court, the plaintiff read in evidence various documents, among them the tax bill sued on, which was made out in the name of L. De Noue as the owner of the assessed lot. The court gave various declarations of law, and rendered a general judgment against all the defendants for the amount claimed, awarding execution against the lot assessed, finding that the tax was a lien thereon, and that it was owned by E. B. H. De Noue, and that her husband had an estate of freehold, not of inheritance, therein.

City of St. Louis, to the use of Rotchford, v. De Noue et al.

The defendants draw in question the validity of the tax bill sued on, because it was not, as is claimed, made out in the name of the true owner of the property; and this involves a construction of section 16, article VIII, of the revised charter of the city of St. Louis. (Sess. Acts 1867, p. 75.) It is there provided that the city engineer, on the completion of a sewer, shall compute the whole cost, and "assess it as a special tax against the lots of ground" within the district limits, "in proportion to the area of the whole district," and "make out a certified bill of such assessment against each lot of ground, * * * in the name of the owner thereof;" that the bill thus perfected "shall be delivered to the contractor executing the work, who shall proceed to collect the same by the ordinary process of law, in the name of the city, to his use;" and that every such bill shall be a "lien against the lot of ground described therein."

The total cost of the sewer is thus charged upon the land within the limits of the designated sewer district, and made a lien thereon in the form of a special tax, which is to be collected, in the absence of voluntary payment, by the ordinary process of law; and no other mode of enforcing collection is provided. The parties interested are to be brought into court and have their rights and duties adjudicated before their property can be sold or otherwise interfered with. It is not, therefore, any matter of moment to the property-holder whether the engineer succeeds in finding out and placing in the tax bill the name of the true owner or not. Any mistake or omission therein is not likely to harm him, and it is not conceived that such mistake or omission vitiates the bill.

These considerations take the case out of the reason of the rule requiring a strict construction of statutes authorizing the imposition and collection of general taxes where these safeguards are omitted. The requirement of the statute making it the duty of the engineer, in respect to these special sewer taxes, to insert in the bill the name of the owner of the respective lots assessed, should have a fair and liberal construction, so as to give effect to the obvious purpose of the enactment. There is no good reason for supposing that it was the intention of the Legislature to make

City of St. Louis, to the use of Rochford, v. De Noue et al.

the validity of the tax and the security of the lien dependent upon the industry and legal judgment of the engineer in searching out the true owner of the assessed property. Accuracy on the part of the engineer in this respect is a matter of convenience to the contractor, but not material to the property owner.

The rights of the owner can not be affected till he has had his day in court. Regarding the clause of the statute requiring the name of the owner to be inserted in the tax bill as directory merely, the question in regard to L. De Noue's ownership ceases to be important in passing upon the validity of the assessment. That is good, notwithstanding there may have been an error in this particular.

But the judgment should have been limited to the property and its owners; whereas a general judgment was asked and rendered against all the defendants, three of whom, at least, were not owners, and for this reason the judgment was erroneous. The deed of trust created a lien upon the property, but the parties to the instrument did not, because of it, become personally liable for the taxes, general or special; and a personal judgment against them for the tax assessed was unwarranted, although they may have been properly joined in the suit as parties having an interest in the property covered by the tax lien. The personal judgment should have gone alone against the actual debtors—the parties who owed, and whose duty it was to pay, the taxes. There is strong analogy between this and mechanic's lien cases, as regards the proper judgment to be rendered, where it has been repeatedly held that the personal judgment must be confined to the real debtors. (*Walkenhorst v. Coste et al.*, 33 Mo. 401; *Heltzell v. Hynes*, 35 Mo. 482.) Whether L. De Noue stood in such relation to the property as to be a debtor for the taxes or in duty bound to pay them, and thus to justify a personal judgment against him, it is not necessary now to determine, or to inquire whether the personal judgment against Mrs. De Noue (a married woman) is warranted by the law.

The judgment of the Circuit Court in general term, reversing the judgment at special term, is affirmed. The other judges concur.

JOHN BARTLING, Petitioner, v. WM. C. JAMISON and JOSEPH VASTINE, Respondents.

1. *Practice, Civil—New trial, right to grant—Probate Court, power of.*—Courts of general common-law jurisdiction in England and the United States seem to have universally exercised the power of setting aside the verdict of juries found in their own courts, and granting new trials; and the statutory provision (Gen. Stat. 1865, ch. 169, § 25) authorizing new trials in certain cases is rather a limitation upon, than a grant of power to, the Circuit Court. But courts of inferior and limited jurisdiction have never been in the habit of exercising this power, and it can not be assumed that such power exists in the probate courts in the absence of authority given by the statute or of long usage.
2. *Practice, Civil—Courts of record—Entries—Verdict—Power over.*—In general, all courts of record, whether of special and inferior or of general jurisdiction, can modify or set aside entries of their own action made during the term, but that does not involve the right to refuse to enter or set aside a lawful verdict.

Application for writ of prohibition.

N. A. Mortell, and Harding, for petitioner.

I. The Legislature intended to confer no more right or power upon the Probate Court to grant a new trial than upon a justice of the peace. (Gen. Stat. 1865, §§ 2, 8, p. 514; 1 Mo. 539; 8 Mo. 45; Gen. Stat. 1865, § 17, p. 713.) No rule of the probate judge is regarded. No error is charged. The circuit judge, on appeal to the Circuit Court, simply proceeds to try the case anew, and makes and completes a record for the District and Supreme Courts. The ecclesiastical and chancery courts had unquestioned right to grant a new trial, but they made and completed the record, and in the appellate court their proceedings were not tried *de novo*; the errors and rulings of the judge were considered in the appellate court as they appeared upon the record or bill of exceptions. (Chit. Blackst., book III, § 411, p. 318.)

II. The authorities on the incidental powers of courts of record are foreign to the judicial system of this State and to the relation existing between the Probate Court and Circuit Court. The inherent power of a court of common-law jurisdiction is not granted courts of limited jurisdiction.

Lackland & Martin, for respondents.

The power of granting new trials grew up in the English courts. It has been exercised by them from the earliest times, and does not depend upon statutes. (Graham & Waterman on New Trials, 2; Tidd's Pr. 904; 1 Burr. 394.) The granting of a new trial, like the granting of a continuance, rests in the discretion of the court. (Gray v. Bridge, 11 Pick. 189.) "To all courts acting on the principles of the common law the power is incident to grant new trials, unless prohibited by positive law." (Bartholomew v. Clark, 1 Conn. 472.) Admitting that our Probate Court inherits its method of proceeding from the chancery courts and ecclesiastical courts, there is nothing in this admission against the right to grant a new trial; the right to try an issue by a jury, it did not acquire from those courts. It is a common-law right, not conferred by statute, and it should carry with it the incidents of trial by jury. The chancery and ecclesiastical courts proceeded according to the method of the civil law. They had no such things as juries or jury trials. (3 Blackst. Com. 100.) "Their decisions may be the subject of a re-hearing or appeal by any party who considers himself aggrieved by it." (2 Dan. Ch. Pr. 1543, 1540; Hunter v. Marlboro, 2 Wood. & Minot, 168; Cargill v. Spence, 2 Hag. Ecc. Sup. 146; Donellan v. Donellan, 2 *id.* 144; Henley v. Morrison, 2 *id.* 147; Webb v. Webb, 1 *id.* 349; Shaunessey v. Allen, 1 Lee, 9.) Our Probate Court is a court of record. (Gen. Stat. 1865, § 5, p. 900.) It has terms. It is vested with the common-law right of trial by jury. (*Id.* § 10, p. 190.) Although the Surrogate's Court of New York is not a court of record (Dayton's Sur. 6), yet the right to open and set aside judgments and decrees is recognized as incident to the power to make them. (Sipperly v. Baucus, 24 N. Y. 46; Harrison v. McMahon, 1 Bradf. 283.) The power is incident to a jury trial in a court of record, where the jury are to decide the facts, and are not judges of the law.

BLISS, Judge, delivered the opinion of the court.

John Bartling presents to this court his petition setting forth that upon information of W. C. Jamison, as administrator of

Bartling v. Jamison et al.

estate of Edgar J. Noe, a citation was issued against him by Joseph P. Vastine, Judge of the Probate Court of St. Louis county, for the discovery of concealed property belonging to said estate. The charge was that he had concealed and embezzled a solitaire diamond ring, and the person so charged, the applicant for this writ, appeared and claimed that the ring was presented to him by deceased; and upon trial by jury the verdict was in his favor. The administrator applied for a new trial, which was granted by the Probate Court; and before the second trial the petitioner applies to this court for a writ of prohibition, claiming our protection from an exercise of an illegal power on the part of the court.

The proceeding in the Probate Court was instituted under sections 7-11, ch. 121, General Statutes, and the application raises the question whether the Probate Court has power to set aside verdicts of juries in the few cases where jury trials are provided in that court, and grant a new trial upon the merits. It is claimed on behalf of the respondents that this right is incident to all courts of record; that it exists independent of any statute, and that probate courts and county courts should be held to possess it unless it is expressly prohibited. On the other hand, the petition is founded upon the theory that the right of courts to review the verdict of juries is regulated, in Missouri, by statute; that this right may be exercised once in the Circuit Court, but is nowhere granted in the proceeding in question, and that the only new trial that can be obtained is upon appeal, under the provisions of chapter 127 of the General Statutes.

That courts of general common-law jurisdiction have the right to review and set aside the verdict of a jury found in its own court, and grant a new trial, has been maintained for some two hundred years, though its exercise was rare in the common-law courts, especially in King's Bench, until the clear and masterly exposition of its necessity by Lord Mansfield, in 1 Burr. 394. Courts of similar jurisdiction in the United States have universally, so far as I am advised, exercised the power, whether given by statute or not. Section 25, chapter 169, General Statutes, which provides that "the court may award a new trial of any issue

Bartling v. Jamison et al.

upon good cause shown, but not more than one new trial of the same issue shall be granted to one party," is rather a limitation upon, than grant of power to, the Circuit Court. The granted authority varies in no manner from the pre-existing power, for courts always based their action upon "good cause shown," real or supposed. Among the causes were misconduct of the jury or of any jurymen, disregard of the law as given by the court, newly-discovered evidence, excessive damages, etc. No court would be tolerated in its arbitrary exercise, although it is a power resting in a sound legal discretion and the reasons are not always stated upon the record.

But I do not find that courts of inferior and limited jurisdiction have ever been in the habit of thus attempting to control the verdict of juries. I have consulted the cases submitted by counsel, and have examined the books to find, if possible, what has been the practice in England and the other States. But there is very little reported upon the subject, probably for the reason that courts of special jurisdiction have not often attempted to exercise the power in question. In an old New York case—*The People v. the Sessions of Chenango*, 2 Caines, 319—Justice Kent emphatically denies the power of that court to grant a new trial upon the merits, because it is an "inferior court, and such courts are not intrusted by law with the power of setting aside verdicts of juries upon the merits."

There are many reasons why the county and probate courts of the State should not be clothed with this power. However competent may be the judge of probate in St. Louis and some of the larger counties, as a general thing the probate and county courts are composed of men unlearned in the law and incompetent to pass upon the various considerations laid down in the books as grounds for a new trial. The law does not require any special qualification for the position, and it would be unreasonable to give one or three men power to revise and set aside the finding of men of equal legal learning with themselves, upon matters which they alone had authority to decide. We can not assume that such a power exists, unless it is given by statute or has been long exercised, and has been long sustained by the higher courts. Another

Dover v. Kennerly et al.

reason exists in the provision of the statute. The usual reasons for this power do not exist, inasmuch as a new trial is provided for in another way. The dissatisfied party need only appeal to the Circuit Court, and the whole merits of the case can be again passed upon. He is thus relieved from all the hardships of the supposed errors of the jury, without the expedient the courts of Westminster were compelled to sanction.

Respondents cite us to cases where courts of probate and ecclesiastical courts have opened up orders and permitted re-hearings of matters once passed upon. This is done under various rules and regulations in all courts, but it is a very different thing from setting aside verdicts. In general, all courts of record, whether of special and inferior or of general jurisdiction, can modify or set aside entries of their own action made during the term, but that does not involve the right to refuse to enter or set aside a lawful verdict.

Let the writ issue. The other judges concur.

JEROME B. DOVER, Defendant in Error, *v.* THOMAS J. KENNERLY
et al., Plaintiffs in Error.

1. *Deed of trust—Resale.*—At a sale of real estate under a deed of trust, where the highest bidder fails to pay the purchase money, the property may be resold by the trustee; and, in the absence of any satisfactory proof that the beneficiaries officiously or unfairly intermeddled with the duties of the trustee, or did anything to prevent other persons from bidding at the sale, or took any unfair advantage for the purpose of getting the property at a price below its value, the claim of the grantor for relief must fail. (*Dover v. Kennerly et al.*, 38 Mo. 469, affirmed.)

Error to Second District Court.

For statement of the facts in this case, see *Dover v. Kennerly et al.*, 38 Mo. 469.

Cline, Jamison & Day, and *Abner Green*, for plaintiffs in error.

Dover v. Kennerly et al.

An agreement made among several persons to divide property purchased or bid off by one of them at a public or judicial sale is not objectionable, unless the agreement is equivalent to a combination among those who would otherwise be themselves bidders to obtain the property at a reduced price. (Wooten v. Hinckle, 20 Mo. 290; Neal v. Stone, 20 Mo. 294; Dover v. Kennerly *et al.*, 38 Mo. 469; Phippen v. Stickney, 3 Metc. 388; Gardiner v. Morse, 25 Me. 140; Small v. James, 1 Watts & Serg. 128.)

John L. Thomas, and *James A. Beal*, for defendant in error.

The refraining of one person to bid at a public sale by agreement, or not to bid against a particular person, is treated as a fraud, without regard to the honest or dishonest intent, to cheat or get the property at a sacrifice. (Jones v. Caldwell, 3 Johns. Cas. 29; Devlin v. Ward, 6 Johns. 194; Wallace v. Howe, 8 Johns. 144; Thompson v. Daws, 13 Johns. 444; Dudley v. Little, 2 Ham. 505; 1 McLean, 295; 2 Halst. 57; 1 Sto. Eq. § 293; 6 T. R. 642.) The purchasing of property by agreement of parties, or by refraining from bidding, is a fraud upon the debtor. (Wooten v. Hinckle, 20 Mo. 290; Neal v. Stone, 20 Mo. 294; Hook v. Turner, 22 Mo. 333; Stewart v. Nelson, 25 Mo. 309; Miltenberger v. Morrison, 39 Mo. 71.) "Although no one act of the *cestui que trust* may of itself be sufficient, yet if all his acts taken together show a fraud upon the debtor, the deed under the trustee's sale will be set aside." The whole acts of Kennerly are fraudulent on the debtor. (10 Mo. 75.)

FAGG, Judge, delivered the opinion of the court.

This cause has been before this court at a previous term, and was reversed and remanded to the Jefferson Circuit Court for further proceedings. It is again brought here by writ of error to the Second District Court, and stands upon the same pleadings, and with but little change in the facts proved at the trial. In the opinion delivered at the October term, 1866, there is a very

full statement of the case, and it is unnecessary to repeat it here. (See 38 Mo. 469.) All of the questions presented by the record as it then stood were fully disposed of; and, without the introduction of new evidence and the proof of new facts, there is no ground upon which the plaintiff below could be entitled to the second decree which has been rendered for him by the Circuit Court. In the opinion of this court above referred to it was distinctly held that there was no impropriety in the second sale of the property made by the trustee; that there was no actual fraud on the part of the defendants proved, and no evidence whatever of any secret arrangement or fraudulent combination by which any person was restrained from bidding, or by which the purchaser was enabled to obtain the property at a price less than its real value. The testimony of the plaintiff himself, together with the new facts brought out in the examination of O'Fallon, one of the defendants, seems to be the chief reliance of counsel to show a different state of case from that presented by the first trial. If it shall turn out, upon a careful examination of this evidence, that it does not, in the language of the former opinion in this case, amount to "satisfactory proof that the beneficiaries officiously or unfairly intermeddled with the duties of the trustee, or did anything to prevent other persons from bidding at the sale, or took any unfair advantage for the purpose of getting the property at a price below its value," then the claim for relief must fail.

The only statement made by Dover, the plaintiff, which can be claimed as even tending to show any combination between the defendants to take an unfair advantage in the sale of the property is the following: "The Kennerlys said if I had gone to them before the second sale they would have given me the same chance they did O'Fallon; that they had given him a bond for a deed." This statement, when explained by the testimony of other witnesses, only goes to show that a bond to convey the title to O'Fallon was executed, after the purchase, by the Kennerlys at the second sale. The statement of O'Fallon, that this bond was executed in pursuance of an arrangement made previous to the sale, is wholly unsupported by any testimony in the cause. On

the contrary, it is directly contradicted by the statements of the three Kennerlys, and indirectly by the deposition of Governor Thomas C. Fletcher. None of the witnesses pretend to say in direct terms that there was any actual fraud in the conduct of these parties, or that any was intended. The answer of O'Fallon himself expressly denies it. It should not be forgotten, in the examination of his testimony, that the effect of the decree asked for in this case is directly to benefit him as the creditor of Dover to a considerable amount; and the case which it is now claimed has been made out by him is altogether different from the averments in his answer, as well as his statements made under oath at the first trial.

It is admitted as a rule of law well settled that a combination to enable a purchaser at a sale of this sort to obtain property at a sacrifice is fraudulent. But admitting that the testimony of O'Fallon is true, and giving it all the force to which it is entitled, can it be said that there was such a combination as to depress the price of the property? He had bid off the property at the first sale, in the month of March preceding, and was unable to comply with the terms of the sale for the want of means. He himself does not pretend to have been in any better condition at the second sale. From all the facts and circumstances, he could not have been regarded by any of the parties as being in a condition to bid for the property, and thereby contribute to produce such a competition among the bidders as to swell the amount of the sale. By his own showing, he was not in a condition to have bid more for the property than it actually sold for; and the arrangement made with the Kennerlys subsequent to the sale shows most conclusively that he could only become the purchaser by getting time to make the payments.

The conclusion is, therefore, that whatever hardships may have resulted to the plaintiff in this case, they are rather to be attributed to the unpropitious times and circumstances under which the property was sold than to any combination or arrangement on the part of the purchasers to get it under its real value. The statement of O'Fallon, that the object of the arrangement between himself and the Kennerlys was to get the land as cheap as

Ex parte Donaldson.

possible, really amounts to but little in the absence of any proof of his intention or ability to pay more than the amount of their bid.

The judgment of the District Court affirming the judgment of the Circuit Court will therefore be reversed, and the decree of the latter court reversed and the bill dismissed. The other judges concur.

[Motion for re-hearing was filed at October term, 1868, and was overruled at March term, 1869, but no opinion delivered.]

Ex parte WILLIAM DONALDSON.

1. *Practice, Criminal—Indictment—Habeas corpus—Discharge—Construction of statute.*—Section 28, chapter 213, Gen. Stat. 1865, by which a person indicted for any offense is entitled, subject to certain conditions, to be brought to trial before the end of the third term thereafter, was intended to apply to the Circuit Courts in the State exercising criminal jurisdiction, wherein only two terms are held during the year, and not to the Criminal Court of St. Louis county.
2. *Criminal law—Indictment—Continuance, discretion vested in courts in matter of.*—Where, under section 29, chapter 213, Gen. Stat. 1865, a continuance is granted to the State by the court, every inference is to be made in support of its rulings, and courts are bound to believe that the facts existed which, according to law, justified the continuance.
3. *Criminal law—Circuit attorney—Nolle prosequi—Discharge.*—The circuit attorney has the right to enter a *nolle prosequi*, with the assent of the court, at any time before the prisoner is put upon his trial; and there is nothing in such proceeding to prevent the prisoner from being further held amenable.

Petition for habeas corpus.

L. M. Shreve, for petitioner.

C. P. Johnson, circuit attorney, and *H. B. Johnson*, attorney-general, for the State.

Under the provision of the statute, sections 28, 29, chapter 213, the prisoner would not be entitled to his discharge until the expiration of the March term, 1869, and such term has not yet

Ex parte Donaldson.

expired. (12 Mo. 592; 14 Mo. 386; 21 Mo. 464; *Ex parte* Walton, 2 Wheat. 501.) The circuit attorney, in criminal proceedings, may, at any time before trial, of his own accord, and at any time before judgment, with the assent of the court, enter a *nolle prosequi*. (1 Whart., 5th ed., 513; Commonwealth v. Wheeler, 2 Mass. 172; Commonwealth v. Briggs, 7 Pick. 179; State v. Lopez, 19 Mo. 254.)

WAGNER, Judge, delivered the opinion of the court.

The petitioner prays for a writ of *habeas corpus*, and states that he is imprisoned and restrained of his liberty in the county jail of St. Louis county by Emile Thomas, the jailer thereof; that he is so detained under and by virtue of an affidavit made by Charles P. Johnson, the circuit attorney, on the 9th day of April, 1869, charging him with the crime of murder, upon which a warrant was issued from the St. Louis Court of Criminal Correction, and upon said warrant he was imprisoned, and is still held in custody. He further states that he was indicted at the July term, 1868, of the St. Louis Criminal Court, by the grand jury of St. Louis county, for the same offense for which he is now again proceeded against; and that on the 14th day of July, 1868, he pleaded not guilty to the said indictment; and that the case was set down for trial on the 30th day of July, and that he announced himself ready for trial, but the State continued the case for the alleged absence of two witnesses, Ray and Glover, and for the same cause continued the case at the September, November, and January terms of said court. At each continuance the petitioner represents that he was ready for trial, and so announced himself, and objected to the cause being continued by the State; that the delay to try the case did not happen on the application of the prisoner, nor was it occasioned by want of time to try the same. The petitioner also states that when the case was continued at the January term, it being on the 20th day of said month, he did, during said term, on the 10th day of February, file a motion in the Criminal Court for his discharge, grounded on the fact that he had not been brought to trial within three terms of said court, exclusive of the term at which he was

Ex parte Donaldson.

indicted; that on the 27th day of February said motion for his discharge was set and called for hearing, at which time he was present, and asked to have said motion heard and the prayer thereof granted, but the court continued the motion over to the next term, for the reason that the circuit attorney was not there; and afterward, at the March term of said court, the motion was argued and submitted to the court, but, before any judgment was rendered thereon, the attorney for the State entered a *nolle prosequi*. The prisoner, therefore, claims that by law he is entitled to the benefit of the writ prayed for, and ought to be discharged.

The issuing of the writ is opposed in this court by the circuit attorney, prosecuting in behalf of the State.

The usual practice where a writ of *habeas corpus* is asked for is to grant it, and hear the arguments on the merits at the return. But the reasons on which the application for discharge is based are agreed upon by the parties, and they have argued the question here in the first instance. Besides, the statute expressly provides that any court or magistrate empowered to grant writs of *habeas corpus* shall grant such writ without delay, unless it appears from the petition itself, or the documents annexed, that the party can neither be discharged, admitted to bail, nor in any other manner relieved. (Gen. Stat. 1865, p. 623, § 5.)

The right of the prisoner to be discharged under this writ is based solely on the ground that, without any fault or hindrance on his part, he was not brought to trial on the indictment found against him by the grand jury at the July term, 1868, before the end of the third term after that in which the indictment was preferred. And the position is now distinctly taken that under the statute, being then entitled to his discharge from the offense of murder, he can not again be lawfully deprived of his liberty for the same offense.

Under the general practice regulating criminal practice throughout the State, provision is made for discharging persons indicted for an offense, where they are committed to prison, at the end of the second term, where the delay has not happened on the appli-

Ex parte Donaldson.

cation of the prisoner. But it seems that in this case the prisoner was admitted to bail, and it must, therefore, if relief is granted, be brought within the provisions of the 28th section of chapter 213 of General Statutes. That section says: "If any person indicted for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happens on his application, or be occasioned by the want of time to try such cause at such third term."

The next succeeding section (section 29) declares: "If, where application is made for the discharge of a defendant under either of the two last sections, the court shall be satisfied that there is material evidence on the part of the State which can not then be had; that reasonable exertions have been made to procure the same, and that there is just ground to believe that such evidence can be had at the succeeding term, the cause may be continued to the next term, and the prisoner remanded or admitted to bail, as the case may require. If the defendant shall not be tried before the end of the term last mentioned, the State shall not be entitled to any further continuances of the case, and the prisoner shall, if he require it, be discharged."

Section 28, above referred to, and under which the right is claimed, is general, and applies to the Circuit Courts in the State exercising criminal jurisdiction. In these courts only two terms are held in the year, at intervals of six months each; and it was reasonably supposed that if the prisoner was not brought to trial within eighteen months in one instance, or within twenty-four months in the other, the prosecution was either frivolous or oppressive, or would ultimately be unavailing. But the Criminal Court in St. Louis is differently organized. It was instituted by special act of the Legislature, and is distinguished from all the courts taking cognizance of criminal proceedings. It has six terms a year, and is in session nearly all the time. If the statute providing for the discharge of persons indicted for crime is applicable to the St. Louis Criminal Court, then a wonderful discrimi-

Ex parte Donaldson.

nation is made in favor of prisoners in St. Louis, and against those in all other parts of the State. When the person is entitled to his discharge in eighteen or twenty-four months in all the remainder of the State, a person in the like situation and under the like circumstances would be entitled to be discharged in St. Louis in the one case in six months, in the other in eight months.

It requires no argument to show that the Legislature never contemplated any such result. It was never intended that there should be any difference in the period or duration of time in respect to liberating persons indicted in the several counties of the State. Indeed, it is apparent that in drawing the statute the mind of the legislator was directed exclusively to the ordinary courts of criminal jurisdiction throughout the State, and that no reference was made to the St. Louis Criminal Court, which was organized specially to meet a required exigency. No provision was made that was intended to comprehend within its scope the St. Louis Criminal Court. This is undoubtedly a defect in the law—a *casus omissus*—but the courts can not supply it by intendment; the legislative power must be invoked to furnish an adequate remedy.

The constitution of the State (article I, § 18) declares that on an indictment the accused has a right to a speedy trial. The statute was intended practically to carry out that right, by prescribing a definite and uniform rule for the government of courts in their practice. Were there no statute on the subject, the courts would have the unquestionable right to intervene, where the delay, oppression, and wrong were palpable. But this is not that case. The construction that we have placed on the twenty-eighth section, excluding the Criminal Court of St. Louis county from its operation, effectually disposes of this application, but there is another question that may be noticed.

The twenty-ninth section provides that if, when application is made for the discharge of a defendant under the preceding sections, the court shall be satisfied that there is material evidence on the part of the State which can not then be had, that reasonable exertions have been made to procure the same, and that there is just ground to believe the evidence can be had, the cause may

State ex rel. Bornefeld, relator, v. Kupferle.

be continued to the next term, and the prisoner remanded or admitted to bail. When the term arrived which is designated by this section, the court continued the cause. Every inference is to be made in support of its rulings, and we are bound to believe that the facts existed which, according to law, justified the continuance. It is true, a motion was subsequently made during the same term to discharge the accused, but there is no evidence before us that the continuance was set aside; and, without that being done, the court had no power to act on the motion. Then, before any further steps were taken by the court, the circuit attorney entered a *nolle prosequi*. This he had a right to do, with assent of the court, at any time before the prisoner was put upon his trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy, and we can see nothing to prevent his being further held amenable.

With the concurrence of the other judges, the writ will be refused.

STATE *ex rel.* CHARLES B. BORNEFELD, Relator, *v.* JOHN KUPFERLE, Respondent.

1. *Quo warranto, writ of*—*Information in nature of a civil proceeding*—*Burden of proof in proceeding under*.—An information in the nature of a writ of *quo warranto* is essentially a civil proceeding; and where such an information was brought to try the right of respondent to the office of secretary of a certain insurance company: *held*, that the burden of proof was upon the relator, and that every reasonable intendment was to be made in favor of the regularity of the proceedings by which respondent was put in office. They were the acts of a private corporation, and are to be presumed regular until the contrary appears.
2. *Corporations*—*Officers, election of*—*Presumptions*.—Officers of a corporation, in possession of their respective offices, are presumed to be regularly elected and entitled to hold until the contrary be shown.
3. *The "German Insurance Company," of St. Louis*—*Power of removal by directors*.—Under the twenty-second by-law of that institution, a majority of the *de facto* board of directors of the "German Insurance Company," of St. Louis, had a right to remove the secretary for sufficient cause, without formal notice of charges or trial; and until their action is impeached it is to be presumed that they acted on sufficient grounds.

State ex rel. Bornefeld, relator, v. Kupferle.

*Information in the nature of quo warranto.**Dryden & Lindley*, and *M. Kinealy*, for relator.

I. The fact being established that Bornefeld was, prior to the 2d day of June, 1868, secretary of the company, the law presumes that relation or state of things to continue in *statu quo* until the contrary be shown. (1 Greenl. Ev. § 41.) To overcome this presumption the defendant relies upon the alleged removal of Bornefeld and the election of defendant as secretary of said corporation; and, as to these allegations, the burden of proof is on the defendant. (1 Greenl. Ev. § 74.) Particularly there, as in this case, the means of proof lie peculiarly within the knowledge of the defendant. (1 Greenl. Ev. § 79, p. 92; 8 Mo. 417.)

II. Rules of evidence and practice in ordinary civil actions have no application in this case. Proceedings on *quo warranto* are regulated by special statute. (Gen. Stat. 1865, ch. 157.) And this is almost a literal copy of 9 Anne, ch. 20: "When English statutes are adopted into our legislation, the known and settled construction of them by courts of law is considered as silently incorporated into the act." (2 Pet. 2; 5 Pet. 264, 358; 12 Pet. 527.) By the ancient practice, the subject had to prove his title to the franchise. (Tancred on *Quo Warranto*, introduction, p. 11; Abbot of Selby v. Keil, case 16, p. 146, cited in Tancred; Rex v. Reek, 2 Lord Raymond, 1445; Rex v. Leigh, 4 Burr. 2143; Cole on Crim. Informations, vols. 54-55 of Law Lib. p. 221.)

III. Under our statute, *quo warranto* is still a criminal proceeding, and punishment is provided by section 5, chapter 157, of General Statutes.

IV. The information is not, strictly speaking, a part of the pleadings. (People *ex rel.* Falkenburg v. Miles, 2 Mich. 448; People v. Richardson, 4 Cow. 97; 4 Cow. 118, and cases cited.)

V. The case in 28 Verm. 594 does not apply, as there is in Vermont no statute concerning *quo warranto*, as we have. The case in 34 Miss. 688 (State v. Brown) does not apply, because *quo warranto* is regulated by a statute peculiar to that State, which allows defendant to plead not guilty, etc. (Rev. Code.

State ex rel. Bornefeld, relator, v. Kupferle.

294, articles 16, 17.) The case in 37 N. Y. 193 does not apply, because "proceedings by information in nature of *quo warranto* are abolished, and civil action substituted." (Vories' Code, 801.)

VI. Relator was entitled to be heard and to have due notice. (Commonwealth v. German Society, 15 Penn. St. 251.) Notice must be particularly and positively averred. (Rex v. Richardson, 1 Burr. 540; Rex v. Liverpool, 2 Burr. 731; Baggs' case, 11 Co. 99; Commonwealth v. Pennsylvania Benef. Inst., 2 Serg. & R. 141.)

VII. The cause of removal must be sufficient. (Ang. & A. on Corp. §§ 427-8; People v. Clark, 15 Ill. 267; 15 *id.* 67; Commonwealth *ex rel.* Fisher v. German Society, 15 Penn. St. 253; 2 Burr. 731; 1 Hawks, 274.)

Finkelnburg & Rassieur, for respondent.

I. An information in the nature of a *quo warranto* is essentially a civil proceeding to decide, as between two parties, who has the better right to an office. (State v. Lingo, 26 Mo. 496; State v. Lawrence, 38 Mo. 535.)

II. The defendant, being in possession, will be presumed to hold rightfully, and the plaintiff must first prove the charges contained in the information. (State v. Hunton, 28 Verm. 594; State v. Brown *et al.*, 34 Miss. 688; People v. Lacoste, 37 N. Y. 193; McDaniel v. Flower Brook Manuf. Co., 22 Verm. 274.)

III. The burden of proof is on plaintiff when he grounds his right of action upon a negative allegation, and where the establishment of this negative is an essential element in his case. (1 Greenl. Ev. §§ 74, 78.) The illegality of the election of respondent to the office in question is based upon the alleged unlawful election of Vahlkamp and Ploess as directors of the corporation. The information of the relator charges these parties to have been directors *de facto* in participating in the action of the board of directors. The legality of their election can not be inquired into collaterally, without showing a judgment of ouster against them in a direct proceeding for that purpose. (O. & M. R.R. Co. v. McPherson, 35 Mo. 13; 1 Hall, N. Y., 198-9; 9 Johns. 159; 6 Cowpens, 23; Ang. & A. on Corp. § 759.)

State ex rel. Bornefeld, relator, v. Kupferle.

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a writ of *quo warranto*, the writ itself having long since fallen into obsolescence and disuse. The information initiates a civil proceeding to try the right to an office, although in its origin and form it partakes of a criminal character, and is a substitute for the original writ of *quo warranto*. But the proceeding is essentially civil, and that is the established doctrine in this State. (Brison v. Lingo, 26 Mo. 496; McElhany v. Stewart, 32 Mo. 379; Hequembourg v. Lawrence, 38 Mo. 535.) The information, answer, and reply are subject to the rules governing corresponding pleadings in strictly civil causes—the information, in this regard, answering to the petition in civil suits. The question whether, in a given suit, the *onus* of proof is shifted from the complaining party to his antagonist, must be determined upon an examination of the pleadings, and not by reference to the form and history of an obsolete writ.

Apply these principles to the pleadings in the present suit. The relator initiates the proceeding, and alleges in the information that he was duly appointed secretary of the German Insurance Company, and assumed the duties of that office; that on the second day of June, 1868, a minority of the board of directors of the insurance company held an illegal meeting, assuming to be a quorum, and without warrant of law appointed two associate directors, who thereupon assumed to act as such directors; that the board thus composed, illegally and without notice to the lawful secretary, in violation of the by-laws of the company, removed that officer and declared the office of secretary vacant, and thereupon appointed the respondent to fill the vacancy; that the respondent, without any legal appointment or authority, assumed the place, and unlawfully continues therein, excluding the relator—the legal secretary—therefrom. This is the substance of the information, although it contains various other recitals and averments, and sets out in full certain by-laws which are supposed to have been violated by the proceedings complained of.

State ex rel. Bornefeld, relator, v. Kupferle.

The answer denies the material averments of the information, and then proceeds to allege affirmatively a state of facts substantially negating the allegations of the information, and asserting the entire regularity and lawfulness of the proceeding of the directors in declaring the office of secretary vacant, and in the appointment of the respondent thereto. The relator replies, denying the affirmative allegations of the answer.

In that state of the pleadings, on whom is the burden of proof? That is the material question in the case. Aside from an admission on the part of the respondent that the relator was legally in office prior to the second day of June, 1868, and until the office was declared vacant on that day, neither party introduced any testimony at the hearing—each claiming that the burden of proof was on the other. The court held that the *onus* was upon the relator, and gave judgment accordingly.

This is a civil proceeding, as already shown; and unless it is to be taken out of the category of other civil causes, in respect to the form and methods of trial, the judgment of the Circuit Court was clearly right.

The answer denies everything, and the legal presumptions are all against the relator, and yet it is claimed that the affirmative is on his adversary. We hold differently. Every reasonable intendment is to be made in favor of the regularity of the proceedings complained of. They were the acts of a private corporation, and are to be presumed regular until the contrary appears. (22 Verm. 274.) It is alleged that two of the parties who acted were illegally put upon the board of directors. But they acted as directors notwithstanding, and were directors *de facto*. (Ang. & A. on Corp. § 759.) In *State ex rel. Danforth et al. v. Hunton et al.*, 28 Verm. 594, which was a *quo warranto* proceeding, it was held that although the form of the issue required the defendants to show cause, and would therefore seem to indicate that the defendants should go forward, still the *onus* was on the relators; that the form of the issue did not correctly define the true position of the parties in regard to the presumptions of right. The court said: "The defendants are in possession of the office in question, and should be presumed regularly elected and entitled to

State ex rel. Attorney-General, relator, v. Pearcy.

hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." This puts the matter on clear and reasonable ground, and there is nothing in our statute to require a different and less reasonable practice. The New York Court of Appeals, in a late case, held the same doctrine announced in the case from Vermont. (See *The People v. Lacoste*, 37 N. Y. 192; *State v. Brown*, 34 Miss. 688.)

This view of the subject substantially disposes of the motion in arrest. The proceedings of the board of *de facto* directors are to be presumed regular until irregularity is shown. They are not to be presumed irregular. The twenty-second by-law, set out in the information, provides that "officers, except the president and vice-president, shall hold their offices until removed by the majority of the board of directors on a charge of disability, violation of duty, or any other sufficient cause." Under this rule the secretary was removable when the directors should consider there was sufficient cause for it, and they were the judges of the sufficiency of the cause. No formal notice of charges or trial was requisite. A majority of the *de facto* board of directors considered that a sufficient cause of removal had arisen, and accordingly removed the secretary, as the information shows, and put another man in his place. Until their action is impeached by proof, it is to be presumed that they acted on sufficient grounds.

Let the judgment be affirmed. The other judges concur.

STATE *ex rel.* ATTORNEY-GENERAL, Relator, v. GEORGE A.
PEARCY, Respondent.

1. *Recorder of deeds — Buchanan county — Term of office — Construction of statute.*—By the special act of 1864 (Adj. Sess. Acts 1863, p. 502, §§ 1, 3), the Legislature intended to establish a term of office of two years for the recorder of Buchanan county, the officer to be elected at each successive general election. But the object of section 25, chapter 26, Gen. Stat. 1865, fixing the term of office of recorder, under certain conditions, at four years, was to fix an equal and uniform term throughout the State in all counties similarly situated, and embraced in its purview the county of Buchanan. Sections 1 and 3, p. 502, Adj. Sess. Acts 1863, so far as they fix a term of two years, are therefore repugnant to section 25, chapter 26, Gen. Stat. 1865, and null and void.

State ex rel. Attorney-General, relator, v. Percy.

Information in the nature of a quo warranto.

As appears from the petition of the attorney-general, under the act of February 9, 1864, establishing a recorder's office for the county of Buchanan, respondent was, in November, 1864, elected recorder of the county, and was again elected in November, 1866; and afterward, in the general election held in November, 1868, one Alexander Bell was elected to the same office. But respondent, claiming to hold for four years from his last election, by virtue of the provisions of Gen. Stat. 1865, ch. 26, § 25, refused to yield possession, and this proceeding was instituted to test his right to the office.

H. B. Johnson, attorney-general, for relator.

Strong, and *Slayback*, and *Glover & Shepley*, for respondent.

The "act to establish the recorder's office for Buchanan county," approved February 9, 1864 (Adj. Sess. Acts 1863), does not provide for any election after 1864. There is no law of the State providing for any election in 1868. The only law authorizing an election for recorder is the general statute of 1865 (Gen. Stat. 1865, p. 161, § 25). Under this general statute Percy was elected for four years, commissioned and qualified. Percy, therefore, is entitled to the office, and the election of 1868 was void.

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a *quo warranto*, and is designed to test the right of respondent to the office of recorder of deeds of Buchanan county. He claims to hold the office in virtue of an election in 1866, for four years, under the provisions of the General Statutes (Gen. Stat. 1865, p. 159, ch. 26, § 25) and a commission issued to him in pursuance of such election. The relator insists that the election of 1866 was under the provisions of the special act separating the office of recorder from that of the clerk of the Circuit Court of that county. (Adj. Sess. Acts 1863, p. 502, § 1.)

State ex rel. Attorney-General, relator, v. Percy.

In disposing of the case it becomes necessary to construe these respective enactments. Two questions arise: First, did the special act of 1864 contemplate biennial elections, and an official term of two years, not only of the first incumbent, but of his successor as well? and secondly, if it did so establish a term of two years and biennial elections, are its provisions in that respect superseded by section 25, chapter 26, of the General Statutes?

The special act (section 1) provides that "at the general election in November, 1864, a recorder for the county of Buchanan shall be elected, * * * and that he shall hold his office for two years, and until his successor is elected and qualified." And the third section provides how "such *elections* for recorder" shall be held and conducted. The two sections read in connection may be understood as providing that the Buchanan county recorder shall be elected at the successive "general elections," the first incumbent being elected at the "general election" in 1864. If this is the true reading, then biennial elections are contemplated, and the term of office is fixed at two years, not only for the first incumbent, but also for his successors. If the word "elections" in the third section was purposely put in the plural, as it stands, it must refer to the biennial State elections, and not merely to the general election in 1864, mentioned in the first section. The first section employs the words "at the general election," etc., and the third section employs the words "such elections," apparently referring to a succession of general elections, of which the election mentioned in the first section was one. It may be urged with plausibility that the word "elections" in the plural, as it occurs in the third section, is an error, and that the true reading is "such election," referring to the single general election of 1864, mentioned in the first section. The act is sufficiently obscure, indefinite, and uncertain, it must be confessed. The reading, however, to be adopted must be determined by the general scope of the act and the well-recognized policy of the State, adverse to the continuance of men in office for long and indefinite periods. Unless the act, in sections 1 and 3, provides for refilling the office at the recurring general elections, as they occur biennially, it contains no provision for a second election, and the

State ex rel. Attorney-General, relator, v. Pearcy.

party first elected, so far as the act is concerned, would hold indefinitely. That result could not have been intended.

Chapter 19, General Statutes, establishing the "office of register of lands," provides (section 2) that such officer shall be elected and "hold his office for two years, and until his successor shall be elected and qualified;" and chapter 128, in relation to public administrators, provides (section 1) for the appointment of such officer, and that he "shall hold his office for two years, and until his successor shall be qualified." There is nothing else in either act to determine the term of office of these officers, respectively. These general acts, by fixing the term of the first incumbent at two years, have been regarded as thereby fixing a two-year term generally, involving biennial elections or appointments. Assuming, then, that the Legislature intended by the special act of 1864 to establish a term of office of two years, the officer to be elected at each successive general election, is the term of office enlarged by subsequent legislation of 1866 (Gen. Stat. 1865, ch. 26)? It was intended by the new constitution (article IV, § 27), and by the subsequent legislation under it, to correct and mitigate the evils of special legislation, and to establish a system of laws which should be uniform in their application to the same subject matter and circumstances in all the counties of the State.

It was, therefore, in the spirit of this system, provided, in regard to recorders of deeds and the separation of that office from the office of circuit clerk, that, in every county having a population of ten thousand inhabitants, it shall be lawful for the County Court to make an order separating the offices of circuit clerk and recorder of deeds. (Gen. Stat. 1865, ch. 26, § 23.) The subsequent sections of this chapter provide for the election, and define the duties, of such recording officers.

By section 25, it is enacted that "on the first Tuesday after the first Monday in November, 1866, and every four years thereafter, an election shall be held for the said office of recorder, in each county of the State where the offices of clerk of the circuit court and recorder of deeds have been separated."

It is thus seen that the Legislature framed a new law, which

State ex rel. Attorney-General, relator, v. Pearcey.

went into operation for the first time in August, 1866, establishing a new system regulating recorders' offices, and providing for the election of recorders, which applied to "each county in the State where the offices of the clerk of the circuit court and recorder of deeds" had been separated. By its terms it applied to Buchanan county, for these offices had there been separated by the special act of 1864. It is to be borne in mind that at this time there were (so far as I have been able to find) but two counties in the State where this separation had then been effected, namely: St. Louis and Buchanan. By the prior law, which was a special provision incorporated in a general enactment (Rev. Code, 1855, ch. 132), the term of office of recorder of St. Louis county was fixed at six years. By the new system the term was cut down to four years. The term of the Buchanan county recorder, as we have seen, was two years. It was brought up to four years, to correspond with the reduced term of the St. Louis recorder, if the provision applied to Buchanan county at all. The Legislature was establishing a system which was intended to operate throughout the State, on its conditions being complied with, as well in Buchanan county as St. Louis.

It therefore reduced the long term of the one and raised the short term of the other. Its object was to fix an equal and uniform term, throughout the State, in all counties similarly situated. The provision took effect in St. Louis, and reduced the term. Did it have effect also in Buchanan? If the Legislature did not so intend, why was the St. Louis term interfered with at all? It is not improbable that the Buchanan act suggested the idea of framing a uniform system. That act indicated a movement, out of St. Louis, in the more populous counties, in favor of separating the offices of circuit clerk and recorder of deeds.

Apply to these facts the reasoning of the court in *State ex rel. Vastine v. McDonald*, 38 Mo. 529, and the conclusion that the new system in relation to recorders of deeds was intended for Buchanan county seems inevitable. So far as the Buchanan act is repugnant to that system, it is expressly repealed by chapter 224, section 2, of the General Statutes. It was the manifest

aim of the Legislature to produce uniformity. For that purpose it modified the special provisions of the laws relating to St. Louis, shortening the term; and it is not to be supposed that it was intended to exclude Buchanan, the only other county then subject to being affected by the adoption of these new laws. This would be at variance with the object in view.

The particular point decided in the Vastine case is not involved here, although the reasoning of the court in regard to construing statutes applies. There it was manifest that the Legislature did not intend to disturb the special local act. The subsequent act contained nothing new. It was the mere re-enactment, in the course of a general revision, of an old law, precisely as it stood in 1855, long before the special act was passed. The special act was passed in view of the general law as it stood in 1855, and was a particular provision, *pari materia*, and to be construed in harmony with the general law.

The mere re-enactment in 1866 of the general law of 1855, in the course of a general revision of the statutes, it was very justly held, did not repeal or affect the special act of 1857, and for the reason that no such result could have been contemplated or intended. But the case at bar presents an entirely different state of facts. The subsequent act was no mere re-enactment of an old law, but a new enactment, creating an entirely new system, and, by its very words, including "each county in the State" situated as Buchanan and St. Louis counties were. The special act, so far as it fixed a term of two years, was repugnant to and inconsistent with the later enactment, and at variance with the system thereby established. It must therefore yield.

The writ is denied. The other judges concur.

NATHANIEL HOLMES, Defendant in Error, v. B. GUION *et al.*,
Plaintiffs in Error.

1. *Landlord and tenant—Tender of payment of rent by ousted tenant, when sufficient to prevent forfeiture.*—Where a tenant, ousted by his landlord for non-payment of rent, afterward tenders the amount in arrear, and same is

Holmes v. Guion et al.

refused, and the tenant is still kept out of possession, such tender is sufficient to prevent a subsequent forfeiture for non-payment of rent after the time of making the tender. Under such circumstances no rent accrued for that period. (*Graham v. Carondelet*, 33 Mo. 262; *Holmes v. Carondelet*, 38 Mo. 551.)

ON RE-HEARING.

2. *Landlord and tenant—Lease—Ejectment—Judgment by consent, effect of, in subsequent suit.*—Where a suit in ejectment was brought upon a lease, and judgment was rendered by consent for possession and damages, such judgment and consent did not destroy the lease, or plaintiff's right under it. The lease was not surrendered either in law or fact, nor was the lessee estopped from a subsequent suit under it.

Error to St. Louis Circuit Court.

For statement of the case, see opinion of the court. See also *Graham v. Carondelet*, 33 Mo. 262, and *Holmes v. Carondelet*, 38 Mo. 551.

Casselberry, for plaintiffs in error.

I. There was a surrender of the lease in law. (Taylor on Land. and Ten. p. 374, § 515; *id.* 375, n. 1; Coote on Land. and Ten. 397; 2 Platt on Leases, 505; Woodfall on Land. and Ten., 7th ed., 256; Mathews v. Tobener, 39 Mo. 115.)

II. Plaintiff in this suit was estopped and barred by the suit of 1856. [This point was not decided by the Supreme Court when the case was last before them—38 Mo. 551.] (*Miles v. Caldwell*, 2 Wall. 35; *Blanchard v. Brown*, 3 Wall. 245; *Sturdy v. Jackaway*, 4 Wall. 174.)

III. The tender of the rent in October, 1863, was no tender of the rent which fell due in the spring of 1864, 1865, and 1866. Where a debt is payable in installments, the offer to pay one installment when it becomes due is no tender of payment of another installment.

IV. The lease was surrendered in fact. (Woodfall on Land. and Ten. 262; Coote on Land. and Ten. 393.)

C. H. Chapin, for defendant in error.

I. A judgment in an action of ejectment is no bar to the prosecution of another suit in ejectment for the recovery of the same

Holmes v. Guion et al.

premises. The judgment rendered was purely a judgment in an action of ejectment, and is no surrender of the lease in this case, in law or otherwise. (*Holmes v. Carondelet*, 38 Mo. 551.)

II. A forfeiture for the non-payment of rent accruing while the landlord is in possession, by himself or those holding under him, is invalid.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff, as assignee of a leasehold estate, sues in ejectment to recover possession of the premises described in the petition. The original lessor (the city of Carondelet), because of the non-payment of rent, had undertaken to forfeit the original lease, but the proceedings in that behalf were held to be ineffectual. (*Graham v. City of Carondelet*, 33 Mo. 262.) The plaintiff, however, and his tenants were put out of possession, and the premises passed into the possession of the lessor. Whereupon the plaintiff, October 6, 1863, made a tender in full of all rent in arrear, with the interest thereon, which the city of Carondelet (the lessor) and those holding under it refused to accept. The plaintiff then, October 9, 1863, instituted this suit to recover back possession of the leasehold premises. After the suit had been pending some four years—to-wit: November 13, 1867—the lessor (the city of Carondelet) undertook to cure the defect in the proceedings to forfeit the lease by a fresh forfeiture of that date. This second forfeiture is urged as a defense to the present suit. It is claimed that the tender of October 6, 1863, although good and effectual as regards all rents and charges which had then accrued, was nevertheless insufficient to prevent a forfeiture for the non-payment of rent during the subsequent years. This assumes that rent accrued after the tender, for the non-payment of which the lessor was at liberty to forfeit the lease. But that is begging the question. Did any rent accrue during those subsequent years? The answer admits that the defendants, who hold under the city of Carondelet, were in possession on the third day of October, 1863, and they have been in possession ever since, resisting the claims of plaintiff, as this record shows. The plaintiff and his tenants were ousted, and the city of Carondelet and

its grantees have held, used, and enjoyed the premises during the whole period of time subsequent to the tender. Under these circumstances no rent accrued to the lessor against the plaintiff. It would be singular if a landlord, in the use and possession of property, could collect rent from a lessee, whom the lessor had wrongfully ousted and kept from the possession, use, and enjoyment of the leasehold premises, during the period the tenant was thus wrongfully deprived of the property. No reference is made to any principle or authority sanctioning such doctrine, and it can not be maintained. On the 13th day of November, 1867, no rent had accrued for the non-payment of which the lease could be forfeited, and the forfeiture of that date is therefore ineffectual and void.

The remaining points of the case are fully covered by the decisions in *Graham v. Carondelet*, 33 Mo. 262, and *Holmes v. Carondelet*, 38 Mo. 551; and, upon the authority of these adjudications, the judgment of the court below is affirmed, the other judges concurring.

CURRIER, Judge, delivered the opinion of the court, on motion for re-hearing.

In 1856 the city of Carondelet brought a suit in ejectment against the present plaintiff and his tenants to recover from them the possession of the premises described in the petition in this suit. The defense made in that suit broke down, and judgment was ultimately rendered against the defendants therein, on consent, for possession and damages. It is now insisted that that judgment by consent amounted to a surrender, in law and fact, of the controverted lease, and that the plaintiff is thereby estopped from again setting up that lease.

The judgment and proceedings in said suit were alleged and insisted upon as a defense to the suit of *Holmes v. Carondelet*, 38 Mo. 551, as the printed brief therein filed (also filed here) shows; but ineffectually, as the decision in that case shows. It was there held that the judgment by consent, in the suit of *Carondelet v. Holmes et al.*, was no bar to the subsequent suit of *Holmes v. Carondelet*; in other words, that said consent and

Filley v. Fassett et al.

judgment did not destroy the lease, or the plaintiff's right under it, and consequently that the lease was not thereby surrendered, either in law or fact, or the plaintiff estopped from asserting his rights under it. That adjudication, therefore, substantially decides the present suit so far as the same subject matter is drawn in controversy here.

The fact that the judgment in Carondelet v. Holmes was rendered on consent does not enlarge its force or effect. The consent was merged in the judgment. The law of *that* case was decided against the defendants therein, and their consent to the consequent judgment was a mere graceful submission to the inevitable, and in itself involved no more than was implied in the judgment.

It was not, and is not, deemed necessary to go into a detailed examination of the instructions bearing on this subject, which were asked by the defendants and refused by the court.

The motion for a re-hearing is overruled.

GILES F. FILLEY, Respondent, *v.* ALONZO D. FASSETT *et al.*,
Appellants.

1. *Trade-marks — Infringement on, knowledge of by maker — Injunction.*— In a suit to enjoin defendant from selling "Charter Oak" stoves, bearing a certain trade-mark, the fact that parties in other localities manufactured "Charter Oak" stoves, and sent them into market to compete with plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights.
2. *Trade-mark, statute concerning — Claim filed under — Effect on existing rights.*— The statute concerning trade-marks (Gen Stat. 1865, p. 912) was not designed to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired by appropriation and use.
3. *Trade-mark, statute concerning — Claim under, not available for manufacturers without the State.*— A written claim to a disputed trade-mark, filed in the office of recorder of deeds in the county of St. Louis, under the act of March, 1866 (Gen. Stat. 1865, p. 912), can not avail the manufacturer of stoves in another State.
4. *Trade-marks of the goods must point out their true source and origin.*— Any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark, which is adapted to point out the true source and origin of

Fillee v. Fassett et al.

- the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. But the mark must point out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves; and the fact that the name of a trade-mark, with the combined device, are neither descriptions nor suggestive of the style, character, or qualities of the article manufactured, is one of their virtues as a trade-mark.
5. *Trade-mark pointing out the source and origin of goods, a property acquired.*—By the adoption and use of a name and device adapted to point out the true source and origin of the manufactured article, the manufacturer acquires a property interest therein which the courts will protect.
 6. *Trade-mark—Name separated from surrounding device—Use of by other parties an infringement.*—As "Charter Oak" stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself, the use of the name "Charter Oak," separated from the other parts of the trade-mark, amounted to an infringement of the maker's rights.
 7. *Trade-mark—Imitation need not be exact or perfect—Deception and fraud need not be proved—Injunction to stop piracy of, when.*—The imitation of the original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the goods. Nor is it necessary to prove intentional fraud. If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction.

Appeal from St. Louis Circuit Court.

The facts are fully set out in the opinion of the court.

Chas. LeR. Moss, for appellants.

I. A silent acquiescence in use or imitation of a trade-mark, even for a short period, has been deemed sufficient ground for withholding equitable relief. (*Flavel v. Harrison*, 10 Hare, 467; *Gillott v. Esterbrook*, 47 Barb. 455.)

II. The respondent can have no exclusive abstract right to the use of the name "Charter Oak," and he can have no property therein, because, before he used it in the combination which composes his trade-mark, it was a name in general use in language by the public. (*Burnett v. Phalon*, 9 Bosw. 192; *Upton's Trade-Marks*, 177, 210; *Eddleston v. Vick*, 23 Eng. Law & Eq. 53, 54; *Collins Co. v. Cowen*, 3 K. & J. 428; *Carnham*

v. Jones, 2 Ves. & Beav. 218; Knott v. Morgan, 2 Keene, 213; Fettridge v. Wells, 13 How. Pr. 388; Perry v. Truefill, 6 Bea. 73; Gillott v. Esterbrook, 47 Barb. 462, 464; Clark v. Clark, 25 Barb. 675; Comstock v. White, 18 How. Pr. 421; Corwin v. Daley, 7 Bosw. 225; Wolfe v. Goulard, 18 How. Pr. 64; Stokes v. Landgraft, 17 Barb. 608; Amos. Man. Co. v. Spear, 2 Sandf., S. C., 606; Kendall v. Davis, 2 R. I. 566.)

III. The name "Charter Oak" does not indicate the origin or ownership of the article manufactured; (see Partridge v. Menck, 2 Barb. Ch. 103; Stokes v. Landgraft; Wolfe v. Goulard, 18 How. Pr. 64; Corwin v. Daley; Amos. Man. Co. v. Spear; Gillott v. Esterbrook; Upton's Trade-Marks, 136;) and it is only as such a name is effectual in performing the office of the name and address of the manufacturer that it contains the essentials necessary to such protection. (Upton's Trade-Marks, 99, 102, 178, 179.)

IV. Appellants having complied with the provisions of the statutory regulations (Gen. Stat. 1865, p. 912), are regulated thereby. (People v. Lomax, 6 Abb. 39; Wheeler v. City of Chicago, 24 Ill. 107; Walker's Am. Law, 51; Kent's Com. §§ 472-3, note; *id.* § 509; Moore v. Vance, 1 Ohio, 1; McVey v. University, 11 Ohio, 136; Commonwealth v. Cooley, 10 Pick. 37; Commonwealth v. Marshall, 11 Pick. 251; Lakin v. Lakin, 2 Allen, 46; Bartlett v. King, 12 Mass. 562; Ellis v. Payne, 1 Pick. 45; Commonwealth v. Chapin, 5 Pick. 243; Nichols v. Squire, *id.* 168; Upton's Trade-Marks, 68-9; Dennis on Stat. 523, 530, 531, 638; Smith v. Banker, 3 How. Pr. 142; Church v. Rhodes, 6 How. Pr. 281; Dean of Ely v. Bliss, 5 Beav. 582; Moore v. Westervelt, 3 Sandf. 765; Smith v. Lockwood, 13 Barb. 209; Dudley v. Mayhen, 3 N. Y. 9.)

S. S. Boyd, for respondent.

I. The recognition by courts of equity of the right of a party to his trade-mark and its consequent protection by injunction are now so firmly established by the highest authority, as a proper subject for the exercise of the restraining control of a court whenever violated, that it is no longer an open question. (Amos-

 Filley v. Fassett et al.

keag Manufacturing Co. v. Spear, 2 Sandf., S. C., 606. But what is a trade-mark? It may be "either the name of the maker or symbolical." (2 R. I. 569.) "All marks, forms, or symbols appropriated as designating the origin or ownership of the thing to which affixed" (2 Sandf., S. C., 606; 17 Barb., S. C., 609), or even a "name, when used as indicating the true origin or ownership of the article." (13 How. Pr. 387; 18 How. Pr. 67; 4 Abb. Pr. 158; 17 Barb. 608; 47 Barb. 463, 466; Howard v. Henriques, 3 Sandf., S. C., 726; Marsh v. Billings, 7 Cush. 322; Burnett v. Phalon, 9 Bosw. 192; Howe v. Howe Machine Co., 50 Barb. 236; Newman v. Alvord, 49 Barb. 599; Gillott v. Esterbrook, 47 Barb. 471; Knott v. Morgan, 2 Keene, 220; Sykes v. Sykes, 3 Barn. & Cress. 543; Clement v. Maddick, 22 Law Rep. 428; Remsen v. Bentall, 3 Law Jour., N. S., 161; Seixo v. Provezende, 1 Ch. App. Cas. 184; Barrows v. Knight, 6 R. I. 434; McAndrews v. Bassett, 10 Jur., N. S., 550; Pidding v. How, 8 Sim. 477; Goutt v. Aleplogliu, 6 Beav. 69; Croft v. Day, 7 Beav. 89; Messerole v. Tynberg, 4 Abb. Pr., N. S., 414; Ainsworth v. Walmsley, 1 Law Rep. 254; Farina v. Silverlock, 39 Eng. Law & Eq. 517; Williams v. Johnson, 2 Bosw. 1; Newman v. Alvord, 49 Barb. 592; 4 Abb. Pr. 158.) *A fortiori*, may a name, "Charter Oak," which is as far removed as can be imagined from any actual representation of the article to which it is applied, be sustained as a trade-mark for a cooking stove, when, in addition, it is coupled with a device of oak leaves, which, of itself, can have no connection with or possible significance in relation to such article.

II. Even if knowledge on the part of respondent of infringements were shown, yet there is here no waiver of any right, such implied consent being at any time revocable. (Gillott v. Esterbrook, 47 Barb. 471.) And the fact that all these parties have used this trade-mark can not avail these appellants. (Taylor v. Carpenter, 3 Sto. 462; 2 Wood & Min. 8; Coates v. Holbrook, 2 Sandf. Ch. 596.)

III. The statute concerning trade-marks (Gen. Stat. 1865, p. 912) is remedial, providing only a more efficient and summary remedy for the party aggrieved, and neither in terms nor by

Fillee v. Fassett et al.

necessary implication depriving him of his old remedy at common law, and consequently is but cumulative, leaving the party to proceed either at common law or upon the statute, as he may elect. (Sedgw. on Stat. and Con. Law, 93; Clark v. Brown, 18 Wend. 220.) This statute is by its very terms limited in its application to goods "manufactured or prepared" in this State.

IV. There was an infringement on the part of the appellants in using the name "Charter Oak," even without the device of oak leaves. (Amoskeag Manufacturing Co. v. Spear, 2 Sandf., S. C., 607-9; Gillott v. Esterbrook, 47 Barb. 469; Clark v. Clark, 25 Barb. 76, 79; Eddleston v. Vick, 23 Eng. Law & Eq. 53-4; Sykes v. Sykes, 3 Barn. & Cress. 543; Coates v. Holbrook, 3 Sandf. Ch. 586; Seixo v. Provezende, 1 Ch. App. Cas. 194; Coates v. Holbrook, 2 Sandf. Ch. 597.) It is not necessary to prove intentional fraud on the part of the defendants to warrant equitable relief. (Coffeen v. Brunton, 4 McLean, 519; Dale v. Smithson, 12 Abb. Pr. 238; Partridge v. Menck, 2 Barb. Ch. 103.)

CURRIER, Judge, delivered the opinion of the court.

In 1851 the plaintiff employed N. S. Vedder, an extensive stove-pattern maker of Troy, New York, to design and construct for him a set or series of cooking stove patterns. The patterns were made as ordered, and in a form which resulted in the production of a cooking stove of a new and improved interior arrangement and construction, for which Vedder obtained letters patent, which he assigned to the plaintiff. The plaintiff originated and applied to the stove the name "Charter Oak," which was so formed upon the patterns as to produce the name upon the manufactured article, in combination with a sprig of oak leaves. The name and device was employed to distinguish and designate cooking stoves of the plaintiff's manufacture. The manufacture and sale commenced the following year, and has been followed up continuously ever since; the sales from 1852 to 1867, both years inclusive, amounting to 119,226. These stoves were distributed broadly through the western and southern country, and appear to have been highly popular and successful.

Filley v. Fassett et al.

The testimony shows that stoves are usually known in the trade by their distinctive names and designations, such as "Excelsior," "Climax," "Empire," "Charter Oak," etc.; and that they are advertised and bought and sold by such names and designations; that when a stove is favorably received, and acquires popularity in the market and with those who use it, the peculiar name by which it is known and distinguished becomes a matter of importance to the manufacturer, and of great value to him in the prosecution of his business. The extent of the plaintiff's sales of his "Charter Oak" cooking stove indicates its reputation and popularity, and the consequent value to him of the name by which it was known.

But the answer denies that the plaintiff first appropriated and used that name in such connection as indicating the source and origin of the article to which it was applied, and denies that his use of it has been either exclusive or uninterruptedly continuous, and avers that the contrary of all this is true. Upon these issues a large mass of testimony was taken, from which the following facts are deduced: 1. That the plaintiff's appropriation of the name "Charter Oak," as already detailed, was prior in point of time to any similar use of that name by any other parties. The testimony is clear and entirely satisfactory on this point. 2. That notwithstanding such appropriation by the plaintiff, different manufacturers in Cincinnati, and in that region, at different times subsequently to 1852, applied the same name to cooking stoves of their manufacture, but without the consent of the plaintiff in any instance, and without his knowledge, except in two instances. The first of these two occurred in 1854, and was at once checked by the plaintiff, and abandoned by the Cincinnati manufacturer on being apprised of the plaintiff's rights. The other is that of the manufacture of the stoves, the sale of which, with the plaintiff's alleged trade-mark upon them, is sought to be enjoined by this suit; and the suit was commenced immediately after the facts came to the knowledge of the plaintiff. 3. That J. S. & M. Peckham, of Utica, Oneida county, New York, manufactured in Utica a "Charter Oak" cooking stove, from 1852 to 1857, and then abandoned it, and never

Fillee v. Fassett et al.

necessary implication depriving him of his old remedy at common law, and consequently is but cumulative, leaving the party to proceed either at common law or upon the statute, as he may elect. (Sedgw. on Stat. and Con. Law, 93; Clark v. Brown, 18 Wend. 220.) This statute is by its very terms limited in its application to goods "manufactured or prepared" in this State.

IV. There was an infringement on the part of the appellants in using the name "Charter Oak," even without the device of oak leaves. (Amoskeag Manufacturing Co. v. Spear, 2 Sandf., S. C., 607-9; Gillott v. Esterbrook, 47 Barb. 469; Clark v. Clark, 25 Barb. 76, 79; Eddleston v. Vick, 23 Eng. Law & Eq. 53-4; Sykes v. Sykes, 3 Barn. & Cress. 543; Coates v. Holbrook, 3 Sandf. Ch. 586; Seixo v. Provezende, 1 Ch. App. Cas. 194; Coates v. Holbrook, 2 Sandf. Ch. 597.) It is not necessary to prove intentional fraud on the part of the defendants to warrant equitable relief. (Coffeen v. Brunton, 4 McLean, 519; Dale v. Smithson, 12 Abb. Pr. 238; Partridge v. Menck, 2 Barb. Ch. 103.)

CURRIER, Judge, delivered the opinion of the court.

In 1851 the plaintiff employed N. S. Vedder, an extensive stove-pattern maker of Troy, New York, to design and construct for him a set or series of cooking stove patterns. The patterns were made as ordered, and in a form which resulted in the production of a cooking stove of a new and improved interior arrangement and construction, for which Vedder obtained letters patent, which he assigned to the plaintiff. The plaintiff originated and applied to the stove the name "Charter Oak," which was so formed upon the patterns as to produce the name upon the manufactured article, in combination with a sprig of oak leaves. The name and device was employed to distinguish and designate cooking stoves of the plaintiff's manufacture. The manufacture and sale commenced the following year, and has been followed up continuously ever since; the sales from 1852 to 1867, both years inclusive, amounting to 119,226. These stoves were distributed broadly through the western and southern country, and appear to have been highly popular and successful.

The testimony shows that stoves are usually known in the trade by their distinctive names and designations, such as "Excelsior," "Climax," "Empire," "Charter Oak," etc.; and that they are advertised and bought and sold by such names and designations; that when a stove is favorably received, and acquires popularity in the market and with those who use it, the peculiar name by which it is known and distinguished becomes a matter of importance to the manufacturer, and of great value to him in the prosecution of his business. The extent of the plaintiff's sales of his "Charter Oak" cooking stove indicates its reputation and popularity, and the consequent value to him of the name by which it was known.

But the answer denies that the plaintiff first appropriated and used that name in such connection as indicating the source and origin of the article to which it was applied, and denies that his use of it has been either exclusive or uninterruptedly continuous, and avers that the contrary of all this is true. Upon these issues a large mass of testimony was taken, from which the following facts are deduced: 1. That the plaintiff's appropriation of the name "Charter Oak," as already detailed, was prior in point of time to any similar use of that name by any other parties. The testimony is clear and entirely satisfactory on this point. 2. That notwithstanding such appropriation by the plaintiff, different manufacturers in Cincinnati, and in that region, at different times subsequently to 1852, applied the same name to cooking stoves of their manufacture, but without the consent of the plaintiff in any instance, and without his knowledge, except in two instances. The first of these two occurred in 1854, and was at once checked by the plaintiff, and abandoned by the Cincinnati manufacturer on being apprised of the plaintiff's rights. The other is that of the manufacture of the stoves, the sale of which, with the plaintiff's alleged trade-mark upon them, is sought to be enjoined by this suit; and the suit was commenced immediately after the facts came to the knowledge of the plaintiff. 3. That J. S. & M. Peckham, of Utica, Oneida county, New York, manufactured in Utica a "Charter Oak" cooking stove, from 1852 to 1857, and then abandoned it, and never

after resumed the manufacture of that particular stove. The Peckhams purchased their patterns for this stove of said N. S. Vedder, Filley consenting to the sale on condition that certain alterations were first made in the patterns. This transaction does not appear to have included specifically the right to use the plaintiff's trade-mark, nor does it appear that Filley was ever made aware that the purchasers in fact used it. The design of the stove was patented, and the transaction with the Peckhams involved the granting to them the right to manufacture, in Oneida county, its patented features. That, with the right to sell in a defined territory, would seem to have constituted the inducement to the purchase of these patterns, rather than others. The particular name which the plaintiff had originated for the stove which he proposed to make does not appear to have been mentioned in the negotiations with the Peckhams, or to have been in the minds of the parties. It ought not, therefore, to be inferred from the mere permission granted to Vedder to sell the modified patterns that the plaintiff licensed or sold out the use of his trade-mark, particularly in a contest with third parties; the Peckhams themselves disavowing all right, claim, or interest in the trade-mark, either as originators or purchasers. 4. That the plaintiff's use of the trade-mark claimed by him has been continuous and uninterrupted since its first adoption by him to the present time.

The fact that parties in Cincinnati, or elsewhere, manufactured "Charter Oak" stoves, and sent them into the market to compete with the plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights; and, as already indicated, there is nothing in the case to establish a dedication or abandonment to the public, on the part of the plaintiff, of his supposed rights of property in the alleged trade-mark. There is no testimony having that tendency except the transaction with the Peckhams, and that is insufficient. In *Gillott v. Esterbrook*, 47 Barb. 455, it appeared that an imitation of the plaintiff's mark had been in use for many years, and that for twenty years he had issued printed "cautions" to the public on the subject,

Filley v. Fassett et al.

implying knowledge on his part of such use; but that was held no acquiescence, although the plaintiff had neglected to institute prosecutions.

The depredations of others upon plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him, and courts have not shown any disposition to encourage that line of defense. Woodbury, J., in *Taylor v. Carpenter*, 2 Wood & Min. 8, held this language: "There is something abhorrent in allowing such a defense to a wrong which consists in counterfeiting others' marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruit of their good name, merely because they have shown forbearance and kindness." (See observations of Story, J., same case, 3 Sto. 464.)

After this suit was commenced, Rosenbaum & Co., who seem to be the real parties defending against the action, made an attempt to appropriate the disputed trade-mark to their own use, in due form of law, by filing in the office of recorder of deeds, in the county of St. Louis, a written claim thereto, under the act of March, 1866 (Gen. Stat. 1865, p. 912). A certified copy of the paper so filed, declaring that said Rosenbaum & Co. had adopted "Charter Oak" as their trade-mark for stoves manufactured by them, was given in evidence, and relied upon as showing their title to the trade-mark as against Filley, who had never filed any such document. If this proceeding can be made available for the purpose intended, it may be regarded as an entirely new and improved method of disposing of trade-mark cases, and of appropriating the property of others, the subject of such suits, without risk or inconvenience, and at very slight cost.

A glance at the statute, however, shows that it was intended for no such purpose. It was not designed in the slightest particular to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired in the usual way, or to legalize, in any form or measure, piracy in trade-marks. Property in a trade-mark is acquired at common law only by

appropriation and use, and then only of such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods to which such marks are applied. The statute widens the range of selection, and authorizes the mechanic or manufacturer to adopt any name or device he pleases, and to foreclose any controversy on the subject by writing out and filing with the recorder, as the law provides, an accurate description of the name, device, etc., that may have been chosen. But such paper is to be filed in the county where the goods, etc., are to be manufactured or prepared. It is not perceived how this can be made to apply to Rosenbaum & Co.'s stoves, which are manufactured in another State. The statute has no application to the facts of the present litigation. Nor will any fair construction of it warrant the appropriation by one party of an existing trade-mark, the title and ownership of which is in another party.

But it is objected that the words "Charter Oak," with the accompanying device, lack the requisite ingredients or characteristics of a trade-mark, and therefore it is insisted that the plaintiff could acquire no exclusive right to their use for that purpose. The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it—that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. Thus, it has repeatedly been held that where the name or device employed had, from use or other cause, come to be descriptive of the goods manufactured or sold, their quality and use, such name or device was ineffectual, and could not be upheld as a trade-mark. It was so as to the letters "A. C. A.," in the leading and famous case of the Amoskeag Manufacturing Company v. Spear, 2 Sandf., S. C., 599; as also in Stokes v.

Filley v. Fassett et al.

Landgraft, 17 Barb. 608, and in various other cases cited by the defendants. But these authorities have no application to the mark claimed by the plaintiff; for the name "Charter Oak," with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking stove. In their natural significance, import, or symbolism, or in the use made of them prior to the plaintiff's appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark. (*Fettridge v. Merchant*, 4 Abb. Pr. 158; 6 Beav. 66; 4 McLean, 516.)

The general rule respecting the characteristics of trade-marks has already been given. The following names and designations, among many others, have been held to come within that rule: as pointing to a hotel, "*Irving House*" (3 Sandf., S. C., 726), "*Revere House*" (7 Cush. 322); as pointing to a manufacturer or dealer, "*Cocaine*" (9 Bosw. 192), "*Howe*" (50 Barb. 236); "*Akron*," the name of a town (49 Barb. 599); "*London Conveyance Company*" (2 Keene, 220); "303," the designation of a particular pen (47 Barb. 471); "*Bell's Life*," the name of a newspaper (22 Law Rep. 428); "*Roger Williams Long Cloth*" (6 R. I. 434); "*Day & Martin*" (7 Beav. 89). The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark. By the adoption and use of that mark he acquired a property interest therein which the courts will protect. Have the defendants invaded the rights of the plaintiff in this behalf? The defendants accumulated in the St. Louis market a quantity of the *Rosenbaum & Co.* stoves, with the name "*Charter Oak*" upon them, which they held for sale as "*Charter Oak*" stoves. They were aware of the plaintiff's proprietorship of the "*Charter Oak*" trade-mark, and were proceeding to sell in defiance of plaintiff's rights.

In this condition of things the present suit was instituted, and an injunction granted restraining the defendants from the proposed sale. The only question raised on this branch of the case

is whether the use of the name "Charter Oak," separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark, in combination with the device of oak leaves. On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself. That was the conspicuous element in the mark. By that name the stove was bought and sold, and known in the western and southern markets. It was the prominent, essential, and vital feature of the plaintiff's trade-mark. That name the defendants and their principals appropriated bodily, and applied it to their stoves, and sought to acquire the sole and exclusive use of it by filing their claim in the recorder's office under the statute. That shows their appreciation of the value of the name, and of their purpose not only to use it themselves, but to exclude the originator of it from its use. Granting Filley's exclusive right, there can be no doubt that the things done and purposed by the defendants were of injurious tendency, and that the name "Charter Oak," as employed by them, was eminently calculated to mislead buyers as to the true source and origin of the stove to which the defendants applied that name. If the name, as used by them, was calculated to mislead, the intention to deceive is to be inferred therefrom. (*Fettridge v. Merchant*, 4 Abb. Pr. 159; 4 Mann & Gr. 385.)

The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the goods. (2 Sandf., S. C., 607; 25 Barb. 79; 23 Eng. L. & E. 53-4; 2 Sandf. Ch. 597.) Nor is it necessary to prove intentional fraud. "If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction." (4 McLean, 519; 2 Barb. Ch. 103.)

The result is that the judgment of the Circuit Court must be affirmed. The other judges concur.

Goerges v. Hufschmidt.

ANNA GOERGES, Respondent, v. HUFSCHMIDT and MOSBY,
Appellants.

1. *Instructions—Refusal of evidence.*—Instructions not based upon evidence are properly refused.
2. *Ejectment—Tenant not a party to, not affected by.*—No tenant who was in possession anterior to the commencement of an ejectment suit can be disposed upon a judgment to which he was no party. (*Garrison v. Savignac*, 25 Mo. 53.)
3. *Forcible entry and detainer—Question of title not admissible.*—In an action of forcible entry and detainer, no question of title is admissible. All that devolves upon plaintiff in that proceeding is to show that he was lawfully possessed of the premises, and that defendant unlawfully entered into and detained the same.

Appeal from Sixth District Court.

H. C. Lackland, and Wm. A. Alexander, for respondent.

Bruere, and Lewis, for appellants.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought her action of forcible entry and detainer before a justice of the peace, and the cause was removed, by *certiorari*, to the Circuit Court. Upon trial in that court, the jury found a verdict for the plaintiff, and an appeal was taken to the District Court, where the judgment of the Circuit Court was affirmed, and the cause is now brought here by appeal.

It seems that the plaintiff had been in the possession of the premises in controversy for about five years, part of the time in conjunction with one McIntosh—she and McIntosh occupying separate rooms—she claiming to be the tenant of McCartney, and McIntosh being a mere intruder, holding under no one. The public schools claimed title to the property, and commenced an action of ejectment against McIntosh to recover possession. Immediately after service of the summons he vacated the premises, and judgment by default was rendered against him. A writ of restitution issued on this judgment, and the sheriff forcibly turned the plaintiff out of the house, together with a part of her furniture, though she was no party to the proceeding in ejectment, nor did her name appear in the

writ. After the dispossession, the plaintiff again regained quiet and peaceable possession of the premises, and was thereafter assaulted and ejected by the defendant Hufschmidt, who claimed to be a lessee of the schools, and who put Mosby in as his tenant.

The principal error complained of in this court is the instruction given to the jury, which declared in substance that even if the sheriff did dispossess the plaintiff temporarily, yet if her name was not in the writ under which he acted, then the sheriff had no legal authority to dispossess her, and her right of possession was not disturbed thereby; and that if she returned to the possession, neither the schools nor defendants had the right to dispossess her by force afterward. It is insisted here that this instruction should have been so framed that the question whether the plaintiff went into possession as tenant to McIntosh could have been considered by the jury. But the conclusive answer to this is that there was no evidence on which to base such an instruction. There was no testimony whatever tending to show that the plaintiff went into possession and was a tenant under McIntosh after the commencement of the proceedings against him which resulted in the judgment and writ, and yet this fact must necessarily have existed before the plaintiff could have legally been affected by the writ.

In *Garrison v. Savignac* (25 Mo. 53) the court remarks: "It is said to be a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment suit can be dispossessed upon a judgment and writ of possession to which he is no party." The act complained of, and the evidence, brings this case precisely within the statutory definition of a forcible entry, and no question of title was admissible. All that devolved on the plaintiff was to show that she was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained the same. (Gen. Stat. 1865, p. 731, § 16.) The injustice and oppression which might result from sanctioning such a proceeding as this is forcibly pointed out by Judge Scott, in his opinion in *Garrison v. Savignac*.

The judgment will be affirmed. The other judges concur.

In re Truman, on habeas corpus.

In re HARRY TRUMAN, on habeas corpus.

1. *Crimes and punishments—Counterfeiting U. S. treasury notes, indictable under State or United States courts.*—The passing, with intent to defraud, of a United States treasury note is an offense as well against the State as the United States; and although Congress might, perhaps, by appropriate legislation, render the jurisdiction of the national courts exclusive, still, as it does not appear to have done so, the jurisdiction of the State courts is not suspended. An indictment for such offense is not to be held bad, and the judgment upon it void, for the reason that an indictment would lie, under the laws of the United States, before the national courts, for the same acts as an offense against the United States.
2. *Crimes and punishments—Counterfeiting money obligations indictable under State statute—Construction of statute.*—The Legislature intended, by sections 16 and 21, ch. 202, Gen. Stat. 1865, to make the counterfeiting or passing of counterfeit money obligations, of every class and description, forgery in some of its statutory degrees; and an indictment for passing, with intent to defraud, a United States treasury note, as being an instrument or writing purporting to create a moneyed obligation, may be framed upon section 21 of the statute, setting out therein an offense within the jurisdiction of the State court.
3. *Crimes and punishments—Counterfeiting U. S. treasury notes indictable at common law.*—A counterfeit United States treasury note is a false token, and *semble*, that the fraudulent passing of it as genuine, knowing it to be false, constitutes an indictable cheat at common law. If so, State courts have jurisdiction on that ground, and the jurisdiction is not affected by the fact that the indictment may have been artificially drawn, erroneously concluding against the statute, or may have been otherwise variously defective and subject to demurrer.—(Per CURRIER, J.)
4. *Crimes and punishments—Counterfeiting U. S. treasury notes—Indictment for not inquired into in habeas corpus proceedings.*—The regularity of an indictment in a State court for passing, with intent to defraud, a United States treasury note, and the rightfulness of the judgment rendered thereon, can not be investigated in a *habeas corpus* proceeding. That can be done alone through proceedings operating directly upon the judgment itself.
5. *Crimes and punishments—Habeas corpus—Prisoner detained under final judgment—Regularity of proceedings not inquirable into.*—Where, in proceedings on writ of *habeas corpus*, under section 33, ch. 155, Gen. Stat. 1865, it appears that the prisoner is detained “by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction,” no inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. (11 Mo. 661.)
6. *Crimes and punishments—Counterfeiting United States treasury notes not indictable at common law.*—A prisoner can not be indicted and proceeded against for passing, with intent to defraud, a United States treasury note, as for a common-law offense.—(Per Curiam.)

In re Truman, on habeas corpus.

Petition for writ of habeas corpus.

Mauro & Jones, for petitioner.

I. Congress must delegate the power to punish for counterfeiting the securities and current coin of the United States to the States, and the States must pass laws for the purpose, ere the State courts can have jurisdiction of such offenses. Congress has not done so. (1 U. S. Stat. at Large, 78, § 11.) There is no act that does so authorize. (*Vide* Act of Congress, of April 21, 1866; 2 U. S. Stat. at Large, 404, § 4; Act of Congress, of March 3, 1825; 4 U. S. Stat. at Large, 115, § 26; Laws of U. S. 1863-4, p. 221, § 10 *et seq.*)

II. This State has failed to enact any law to carry such power into effect. Under this indictment he was convicted of forgery in the second degree. Sections 3-11, ch. 202, Gen. Stat. 1865 (p. 793 *et seq.*), are not applicable. Section 9 relates exclusively to the making or uttering of notes, bills, drafts, etc., of banks incorporated under the laws of this State or some other State or county.

CURRIER, Judge, delivered the opinion of the court.

At a special term of the Johnson County Circuit Court, Truman was arraigned, tried, and found guilty of forgery in the second degree, upon an indictment charging the passing by him, with intent to defraud, of a fifty-dollar United States compound interest treasury note. He was thereupon sentenced to imprisonment in the State penitentiary for a term of six years, and was thereto committed in accordance with the sentence. He is now brought before this court in obedience to a writ of *habeas corpus*, with a view to his discharge from further imprisonment, upon the ground that the court trying him had no jurisdiction of the offense charged in the indictment.

It is urged in behalf of the prisoner that the courts of the United States, under the national constitution, have exclusive jurisdiction of the supposed offense, at least until Congress shall delegate the power to legislate upon the subject to the States; that Congress has delegated no such power, and that, if it had,

In re Truman, on habeas corpus.

the State has failed to exercise it by passing laws making the alleged facts an offense. It is therefore insisted that the judgment of the Johnson County Circuit Court in the premises is void and of no effect, and that the imprisonment of Truman is unwarranted and illegal.

The decision of this court in *Mattison v. The State*, 3 Mo. 421, to which we are referred, has ceased to be an authority of force on the constitutional question therein involved, since repeated contrary decisions by the Supreme Court of the United States, of a later date, have established an opposite doctrine. (*Fox v. State of Ohio*, 5 How. 410; *Moore v. State of Illinois*, 14 How. 13.) The facts charged in the indictment under consideration are of a nature to constitute an offense as well against the State as against the United States; and although Congress might, perhaps, by appropriate legislation, render the jurisdiction of the national courts exclusive, still, as it does not appear to have done so, the jurisdiction of the State courts is not suspended. The indictment, therefore, is not to be held bad, and the judgment upon it void, for the reason that an indictment would lie, under the laws of the United States, before the national courts, for the same acts as an offense against the United States. (See 1 Bishop on Crim. Law, par 613, and the numerous authorities there cited.)

It is claimed, however, that the State has passed no laws making the fraudulent passing of counterfeit treasury notes an offense. Section 9, ch. 202, Gen. Stat. 1865, is pointed to as the only provision of the statute under which the indictment found against Truman can be supposed to have been framed. This section and the preceding one has exclusive reference to paper connected with, issued by, or drawn upon banking corporations, and, as a United States treasury note does not belong to this class of paper, the conclusion is reached that the fraudulent passing of counterfeits of such notes is not a criminal offense under our State legislation. This conclusion does not seem to be warranted, since there are other provisions of the statute bearing upon the subject. In a subsequent section of the same chapter (§ 21) it is provided that "every person who, with intent to defraud, shall pass, utter, or publish as true, any forged, counterfeited, or falsely uttered

In re Truman, on habeas corpus.

instrument or writing, shall, upon conviction, be adjudged guilty of forgery in the same degree" that the law attaches to the counterfeiting of the same instrument; and a previous section (§ 16) declares that the counterfeiting of any instrument or writing purporting to create a money obligation shall be deemed forgery in the third degree, unless a different degree is specifically named. It is very clear that the Legislature intended to make the counterfeiting or passing of counterfeited money obligations, of every class and description, forgery in some of its statutory degrees. If, therefore, the treasury note described in the indictment is an instrument or writing purporting to create a money obligation, within the meaning of the statute, as it appears to be, then, for aught that appears upon the face of the indictment, the pleader may have framed it upon the twenty-first, and not upon the ninth, section of the statute, setting out therein an offense within the jurisdiction of the court. Besides, the counterfeit treasury note was a false token; and did not the fraudulent passing of it as genuine, knowing it to be false, as the indictment charges, constitute an indictable cheat at common law? (2 Bish. Crim. Law, par. 238.) If so, then the court has jurisdiction on that ground, and the jurisdiction is not affected by the fact that the indictment may have been inartificially drawn, erroneously concluding against the statute, and been otherwise variously defective and subject to demurrer.

The twenty-first section of the statute above referred to makes the acts and facts therein alleged forgery in a different degree from that whereof Truman was convicted and sentenced. It may thence be inferred or conjectured that the proceeding was under the ninth section, which provides a penalty correspondent with the conviction. But it is idle to inquire what particular section the court or the prosecuting attorney may have had in mind, since, if the acts and facts charged constitute an offense under any section, or at common law, the court had jurisdiction of it, and the regularity of its proceedings and the rightfulness of the judgment can not be investigated in this collateral way. That can be done alone through proceedings operating directly upon the judgment itself.

The statute under which this writ was issued (Gen. Stat. 1865,

Kronenberger v. Hoffner et al.

p. 623, par. 33) provides that when a person is brought up on a writ of *habeas corpus*, the court or magistrate shall at once remand such person, when it shall appear that he is detained "by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction." No inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all errors or irregularities occurring therein the law provides other remedies. (11 Mo. 661.) In the case at bar it appears that the Johnson Circuit Court is a court of general civil and criminal jurisdiction, and competent to try all offenses known to the laws of this State. It had jurisdiction of the person of Truman, and, as we think, also of the offense springing out of the facts charged upon him in the indictment under which he was arraigned.

He must, therefore, be remanded to the custody of the officer having him in charge, under the judgment and sentence of the Johnson County Circuit Court. The other judges concur.

We concur in the above opinion, but do not wish to be understood as assenting to any proposition that the defendant could have been indicted and proceeded against as for common-law offense.

DAVID WAGNER,
P. BLISS.

DOMINIQUE KRONENBERGER, Respondent, v. FREDERICK HOFFNER
and BENJAMIN F. HICKMAN, Appellants.

1. *Land and land titles—Monuments, etc., when must prevail over courses and distances.*—Fixed and known monuments called for in a deed, and also points and lines expressly called for, which are fixed and well known, or are capable of being fixed with certainty, must prevail over courses and distances.
2. *Land and land titles—Lines, how ascertained where there are no express calls.*—Where there are no express calls that determine a line with certainty, evidence *aliunde* is admissible to show where the line was actually run to which the deed refers, or to which it must have reference; and its location, so fixed by extrinsic evidence, will control the courses and distances named in the deed or in the survey. Field-notes and plats of the surveyor, with the calls for courses and distances, properly authenticated, can be shown, not to make a line, but as evidence of an existing line, and they must yield to other satisfactory evidence of its true location.

that they can not run at right angles with this road, but must run as indicated by the dotted lines upon the diagram, varying between five and six degrees; that the true line cuts the house of defendants; and the petition is for that part of the house south of the intersection of the line.

The plaintiff, upon the trial, submitted in evidence the deed of the university to R. W. Wells (dated June 18, 1854) of said lot No. 4, by the following description: "Lot No. 4 in the subdivision of said tract, as per plat recorded in the recorder's office of St. Louis county, and described as follows: beginning at a point in the western line of the Bellefontaine road, distant 360 feet 9 inches southwardly from the northern line of the tract; thence westwardly at right angles to the said Bellefontaine road, 436 feet along the southern line of lot No. 5 to Orchard street; thence southwardly along the eastern line of Orchard street 200 feet to a point; thence eastwardly at right angles to said Orchard street 436 feet to the Bellefontaine road; thence northwardly along the western line of the Bellefontaine road 200 feet to the point of beginning—said lot No. 4 containing two acres." Also, the deed of the sheriff, upon partition among the heirs of Judge Wells, of said lot 4, to C. Garrell, made in June, 1866, and described it as "lot No. 4 of the College Farm, containing two and one-tenth acres, bounded east by the Bellefontaine road, west by Orchard street, south by lot No. 3, and north by lot No. 5;" also a deed of the lot, of April 10, 1867, from Garrell to the plaintiff, describing it as "lot No. 4 of the College Farm, a plat of which is on record in the office of the recorder of deeds for St. Louis county, said lot containing two and one-tenth acres, more or less, and is bounded east by the Bellefontaine road, west by Orchard street, south by lot No. 3 of said College Farm, and north by lot No. 5 of said College Farm, and is part of the real estate acquired by the party of the first part by deed recorded," etc.

The plaintiff introduced as a witness the county surveyor, Mr. J. Pitzman, who testified that in May, 1867, he surveyed the lot for the plaintiff, and made a plat; that he placed the northeast corner of the lot 360 feet 9 inches from O'Fallon's corner,

Kronenberger v. Hoffner et al.

because "that is the distance called for in the plat of the College Farm, and also in the title deeds shown me by Mr. Kronenberger. I was governed by the stated distance alone." Considered himself bound by the stated distance; introduced his plat and said that it included a portion of Mr. Hickman's house in lot 4; and, on cross-examination, explained further that he had before surveyed lot No. 1 for the plaintiff; that upon the recorded plat of College Farm, the lines between the several lots, 1 to 6, seem to be at right angles with Bellefontaine road and Orchard street; that there was a fixed monument at the southwest corner of lot 6 and the northwest corner of lot 5; that the line of division fixed by him was not at right angles with the road, but diverged as much as four degrees; that a perpendicular from Orchard street, 161 feet 3 inches from the northwest corner of lot 5, would strike the Bellefontaine road a considerable distance south of the northeast corner of lot 4, as he placed it, and might clear Hickman's house. He further testified that there was a fence on the south side of College avenue, and that by measuring from O'Fallon's corner on Bellefontaine road, and locating the fronts of the several lots as he has done, there would be some thirty feet surplus on College avenue; and says that when he first surveyed lot 1 for the plaintiff there was a fence between lots 1 and 2, striking Bellefontaine road at right angles, and considerably south of where he located the line.

In the foregoing diagram, where the lines in the plat of Mr. Pitzman varied from those of the original plat, as claimed by the defendants, they are indicated by dotted lines. The defendants introduced H. W. Leffingwell as a witness, who testified that he was agent for the university in the sale of the lots; that Cozens and O'Flaherty made the survey and map (exhibiting it); said it was the original map used at the sale; that the first sale was on the 11th of May, 1853, when he sold lots 1, 5, and 6; that there were no improvements on lot 4, but were on lots 5 and 6; that there was a fence immediately south of the house on lot 5, running to Bellefontaine road, that was pointed out as the south boundary of lot 5; that "the line between lots numbered

4 and 5 ran south of the house, and it was so stated to the purchasers at the time."

W. H. Cozzens, also, was called as a witness, and testified that he and his partner surveyed and subdivided the College Farm; that he personally directed the mode of subdivision; that the corners definitely fixed were the northeast corner on the Bellefontaine road, the next corner west (now the northeast corner of lot 6), and the southwest corner of what is now lot 6; also the line of Bellefontaine road with its angle in lot 5. After he gave the directions the survey was made by his partner, Mr. O'Flaherty. "I know where the line of division between lots 4 and 5 was. It ran just south of the house. There was, at the date of the sale, in May, 1853, a fence just south of the house in lot No. 5, which fence was on the line between 4 and 5. It was so announced at the sale, and so understood. I attended the sale. This large map was then in Mr. Leffingwell's hands. The sale was on the premises. All the improvements were announced to be in lots 5 and 6. I gave directions so as to have the house on lot 5, and it was so surveyed." The witness testifies to a recent survey at the instance of the defendants; goes into detail of his operations, his starting points, etc., to fix the location of the line in dispute; is positive that the line, according to all the calls of the deeds, should be south of Hickman's house, and at right angles with the road; says that the mistake was in putting down in the original plats the length of the front line of lot 6—it should have been over thirty feet longer; his recent survey makes it thirty-five feet longer than on the maps, though the proportions of the platting are correct; and gives his opinion as to what calls in the deed should control.

Mr. Wells, son of R. W. Wells, testified that he was present at the partition sale, and that the sheriff announced that all the improvements were on lots 5 and 6. The defendants offered in evidence the deed of the St. Louis University to R. W. Wells, dated May 12, 1853, of lots 5 and 6, describing them as in the subdivision of College Farm tract, "as per plat recorded," bounded, etc., "beginning at a point in the western line of the Bellefontaine road, 360 feet 9 inches southwardly from the north-

ern line of the tract; thence westwardly, at right angles to said Bellefontaine road, 436 feet to Orchard street," etc., following the undisputed lines, to the northwest corner of lot 5, and thence around to the place of beginning, "said lots 5 and 6 containing two acres and sixty-seven hundredths." At the partition sale, before referred to, these lots were sold and conveyed to defendant Hickman and J. W. Sutherland, and described as containing two and sixty-seven one-hundredth acres, bounded east by the Bellefontaine road, west part by Orchard street, south by lot No. 4, and north and northwest by O'Fallon's lands.

The case having been submitted to the court, it declared the law to be "that in case of a conflict concerning the true location of a certain line between adjoining proprietors, both claiming under the same grantor, in the absence of natural and artificial monuments given in the deeds—there being a conflict between the distances and corners specified in the deeds—the area mentioned in the deeds as the area conveyed to each grantee may be considered as evidence in determining the true location of the line in dispute." After this declaration of law, the court found for the plaintiff and gave him judgment, which was affirmed at general term, and the case is brought here by appeal.

Certain facts are indisputably established:

1. The University, in preparing to sell their land, caused it to be surveyed, platted, and the map recorded.
2. The only fixed monuments to start from in making the survey were found where are now the northeast and northwest corners of lot 6 and the northwest corner of lot 5; but the surveyors established as well the lines of the Bellefontaine road, including the angle in the road laid down in front of lot 5, and of Orchard street, and there is no dispute as to the locality of those lines and of that angle.
3. They surveyed the dividing line of lots 4 and 5, being the line in dispute, but did not fix any permanent monument to define its location.
4. Upon the map the dividing lines of all the lots are apparently at right angles with Bellefontaine road, and all, except the one between 5 and 6, also at right angles with Orchard street.

The map also shows that the point of intersection of the dividing line of lots 4 and 5 with the west line of Bellefontaine road is 34 feet south of the angle in the road line, and it also shows the west line of lot 1 to be 52 2-12 feet long, instead of 43 11-12 as made by plaintiff's survey.

5. But the map shows an inconsistency in the distance from the starting point, to-wit: the northeast corner of lot 6, to this angle and this point of intersection, as compared with the west line of lot 5, which also starts from a fixed monument. Either the dividing line of lots 4 and 5 is not at right angles with the streets, or the west line of lot 5 is too long, or the east line of lots 5 and 6 is too short. Upon either of the former two hypotheses, this dividing line should strike the line of the Bellefontaine road at its angle and intersect the house of Hickman on lot 5. Upon the latter it strikes the road line as laid upon the map, and runs south of the house.

6. The first deed executed to Wells was offered in evidence by defendants, and was for lots 5 and 6, and it calls for the following fixed monuments and lines: 1, the west line of the Bellefontaine road; 2, the northeast corner of lot 6; 3, the east line of Orchard street; and 4, the northwest corner of lot 5. The deed itself does not name any monument by which we can find the exact locality of the disputed line, but we are compelled to locate it from the line it intersects, the distance of the points of intersection from fixed monuments, from its bearing, and by other legal evidence.

7. When the survey was made, the disputed line was actually run south of Hickman's house and along a fence, where he now claims the line to be; and at the sale by the University, and also at the sale upon partition of the Wells estate, it was stated to the purchaser that this line ran south of Hickman's house, and that the improvements were all on lots 5 and 6.

8. All the deeds describe the disputed line substantially alike when they describe it at all, and some of them expressly refer to the recorded plat.

Where the facts are undisputed, the decision of the court, if wrong, is error of law, whatever may be the formal declarations

of law, or whether there be any. If the decision of the Circuit Court can be reconciled with the facts as above stated, and the law as applied to them, it should stand; otherwise it should be reversed. The declaration of law given does not seem to meet the whole case, and it does not become important to consider it.

The rules of law applicable to the class of questions raised by this record have been long settled. It has never been disputed that fixed and known monuments called for in a deed must prevail over courses and distances. Under the same rule should be classed points and lines expressly called for, which are fixed and well known, or are capable of being fixed with certainty. Keeping in view the object of a description—to enable those interested to apply the deed to its subject matter, to ascertain the lines and angles as actually run and established—other rules are equally reasonable and are recognized as well.

Where there are no express calls that determine a line with certainty, evidence *aliunde* is admissible to show where the line was actually run to which the deed refers, or to which it must have reference; and its location, so fixed by extrinsic evidence, will control the courses and distances named in the deed or in the survey. The right to prove the true line of the survey to which the deed refers, and which it follows, does not depend upon the rules applicable to ambiguities in written instruments, though it has a strong analogy to latent ambiguities. It is not a question of construction, but a question of fact. There may be no ambiguity, and yet it may be impossible to locate the land without extrinsic information. If it refers to lines and surveys, the lines and angles as actually run and established must be found, and by the best evidence attainable. If the deed calls for known monuments and abutments, they must be found, and, if destroyed, their location must be proved. If there are no monuments, or they can not be found, any other legal proof of where the line was actually marked upon the ground is admissible. Field-notes and plats of the surveyor, with the calls for courses and distances, properly authenticated, can be shown, not to make a line, but as evidence of an existing line, and they must yield to other satisfactory evidence of its true location. Among the multitude of

authorities are *Opdyke v. Stevens*, 4 Dutch., N. J., 84; *Conn et al. v. Penn et al.*, 1 Pet. 511; *Ogdon v. Paterfield*, 34 Penn. St. 191; *Yamkin v. Cowan*, *id.* 198.)

Some of these rules were evidently disregarded by the court. It is clearly proved that the dividing line of lots 4 and 5 was actually run south of Hickman's house. This fact is established by several witnesses, and is undisputed. There are other undisputed facts that are only consistent with this. In the plat of the original survey under which the lots were sold, the line runs south of the house, and intersects the east line of Bellefontaine road 34 feet south of the angle in the line. This line and this angle are established; and the plaintiff's claims must necessarily assume that this distance from the angle is a mistake, and that, instead of running 34 feet south of it, it must have struck the angle, or come within one or two feet of it. The assumption of the plaintiff contradicts the following established facts: *First*, that the dividing line was at right angles with the road, as described in all the deeds and on the plat; *second*, that it intersected Bellefontaine road south of the angle as shown by the plat; *third*, that it ran south of the house; and *fourth*, its length. And the claim of defendants contradicts the fact that the point of intersection on Bellefontaine road is 360 feet 9 inches south of the northeast corner of lot 6, as named in some of the deeds and marked upon the plat, and is inconsistent with the quantity of land called for. The claim of plaintiff also leaves a strip of land adjoining College avenue undisposed of, while that of the defendants embraces the whole in the several lots, according to the plat of the survey. That there was a mistake somewhere is certain. By locating this mistake upon the line from the northeast corner of lot 6 to the angles of the road, and supposing that it occurred in the measurement, or in transferring the measure to the plat, we reconcile everything—the bearings or corners are right, the other distances are right; all the land is embraced, and the disputed line runs where it is clearly proved to have been originally established.

The carelessness of the surveyor, shown by his own map, in omitting half a chain in his first line, and in his false computa-

tions of quantity, only adds another illustration to the necessity of some more certain mode of finding the established boundaries of our possessions than reliance upon the description of careless surveyors, or upon the perfection of instruments, the best of which are imperfect.

The court could only have come to its conclusion by holding that all the courses, distances, and the actual location of the disputed line must yield to the call for distance from the angles of the road to O'Fallon's corner, and to the call for quantity. In this it committed an error. We do not say that the declaration of law upon the record is erroneous, but it did not embrace all the principles that must have inspired the action of the court. The actual location of boundary lines is disregarded in the attempt to readjust them.

The rules to which we have referred in adjusting disputed boundaries are not inflexible. They are considered as best adapted to the end, which is the location of the actual original boundary line as run upon the land. Distances may be rejected, courses may be rejected, and sometimes even monuments, which, unless under unusual circumstances, are the best evidence attainable. In the elaborate case of *Evans v. Green*, 21 Mo. 170, this court rejected a distinct call for the location of a purchase in the southeast corner of a tract of land, when, from possession and other evidence, it was evidently intended to be in the southwest corner. In *Gibson v. Bogy*, 28 Mo. 478, a call for a boundary upon "the public road" was rejected as inconsistent with the other parts of the deed, and contradicting the intentions of the parties.

There can be no doubt whatever as to the intention of the university in selling those lands to Judge Wells, nor as to the intention of the conveyances in the partition. It is established beyond any dispute that this controverted line was intended to run, *and was actually run*, south of Hickman's house. It therefore cuts off the plaintiff from any claim whatever to any part of the house.

Upon concurrence of the other judges, the judgment is reversed and cause remanded.

Carter, Adm'r of English, v. Carter et al.

H. L. CARTER, Administrator of B. ENGLISH, Appellant, v.
SAMUEL H. CARTER *et al.*, Respondents.

1. *Bills and notes—Statute of limitations—Indorsements of credit, effect upon.*—The time when the indorsement of a credit on a note was made is a fact to be settled by the jury, and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date, and the burden of proving the date to be false lies with the other party. But if the date does not purport to be made coterminously with the receipt of the money, it is inadmissible as a part of the *res gestæ*.
2. *Bills and notes—Statute of limitations—Credits indorsed upon, when evidence of part payment.*—In an action by an administrator upon a note made to his intestate more than ten years before, the indorsement of a credit thereon by the intestate, nearly two years before the note expired by limitation, would be *prima facie* evidence that he had received part payment on the note. Such indorsement was clearly admissible, because against the interest of the deceased.

Appeal from Lincoln Circuit Court.

D. P. Dyer, for appellant, relied upon 37 Mo. 341, and Ang. on Lim. 264, § 3, and cases cited.

WAGNER, Judge, delivered the opinion of the court.

This was an action, originally brought before a justice of the peace, on a promissory note made by defendants to plaintiff's intestate. The note was dated on the 21st day of February, 1847, and on the 10th day of November, 1855, a small credit was indorsed on it in the handwriting of English, the payee and intestate. The suit was commenced on the 23d day of October, 1865, and the defense set up was the statute of limitations. The defendants had judgment in the magistrate's court, and, on appeal to the Circuit Court, the note was read in evidence, and the indorsement thereon, without objection. No other evidence was offered or introduced, and the court affirmed the decision of the justice of the peace. The single question presented for decision is whether the indorsement in the handwriting of the payee was sufficient evidence of payment to take the case out of the operation of the statute of limitations. The indorsement was read without objection, and it is therefore evidence before the court.

Carter, Adm'r of English, v. Carter et al.

In *Coffin v. Bucknam* (3 Fairf. 471), an action was commenced by an administrator more than six years after the date of the note; there was an indorsement on the note in the handwriting of the intestate, purporting to be made about two years before the statute of limitations would attach, and six months prior to his death; and it was held that the jury might regard the indorsement as evidence of a new promise, though there was no other proof of the time when the indorsement was actually made. The court said that the credit would not have been placed on the back of the note if the money had not been paid—and it could have been paid only by the defendant, or by some one authorized by him—that the inference of payment was justified by common experience, and of a character to satisfy the mind. Such proof was a kind of moral evidence in regard to which no reasonable doubt could be entertained. It is the usual, ordinary, and well-known course of business that partial payments are forthwith indorsed on the back of the security, the indorsement thus becoming part of the *res gestæ*. Wherever, therefore, an indorsement is shown to have been made at the time it bears date, which will be inferred from its face, in the absence of opposing circumstances, the presumption naturally arising is that the money mentioned in it was paid at that time. (1 Greenl. Ev. § 122.)

If the date is at a period after the demand became stale, or affected by the statute of limitations, the interest of the creditor to fabricate it would be so strong as to countervail the presumption of payment, and require the aid of some other proof; and the case would be the same if the indorsement bore a date within that period, the instrument itself being otherwise subject to the bar arising from lapse of time. (1 Greenl. Ev. § 122, n. 2.)

The time when the indorsement was made is a fact to be settled by the jury, and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date, and the burden of proving the date to be false lies on the other party. But if the indorsement does not purport to be made contemporaneously with the receipt of the money, it is inadmissible as a part of the *res gestæ*. The inquiry which is usually

Barrett, relator, v. The County Court of Schuyler county.

made in such cases is whether the indorsement, when it was made, was against the interest of the party making it—namely, the creditor—which, in other words, is simply inquiring whether it was made while his remedy was not impaired by lapse of time.

There is another view of this case which is entitled to consideration, if the jury find that the indorsement was made at the time it bears date. It has been often held that entries made by persons deceased, against their interest, are admissible in evidence. (Warren v. Greenville, 2 Strange, 1129; Higham v. Ridgeway, 10 East, 109.) In Doe v. Robson, Lord Ellenborough says: "The ground upon which this evidence has been received is that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it."

In the present case, the indorsement appears to have been made nearly two years before the note expired; the intestate was, therefore, under no temptation to make it for the sake of evidence, for the statute would not be pleadable in law during that length of time. The indorsement, then, was clearly against his interest, furnishing proof that he had received part payment on the note. I think the indorsement was at least *prima facie* evidence, and should have been so considered.

The judgment must therefore be reversed and the cause remanded. The other judges concur.

ARTHUR B. BARRETT, Relator, v. THE COUNTY COURT OF SCHUYLER COUNTY, Respondent.

1. *County bonds; Schuyler county railroad—Implied consideration—Not subject to equities in the hands of assignees.*—In proceedings for *mandamus* by the purchaser of certain bonds issued by Schuyler County Court to the North Missouri Railroad Company to enforce payment thereof: *held*, that although said bonds did not contain the words "value received, negotiable and payable without defalcation," as provided by the act concerning "bonds, bills, and notes" (R. C. 1855, ch. 21, §§ 2, 3), yet they imported a consideration and possessed the ordinary elements of negotiable instruments; and, in the hands of an innocent holder for value, before maturity, were not subject to

Barrett, relator, v. The County Court of Schuyler county.

antecedent equities. The act concerning bonds, etc., had in view classes of paper not usually employed in banking and commercial operations, and not adapted or intended for such uses. It was not meant to embrace bonds put in circulation as commercial securities, to be sold and used by a railroad company in defraying expenses of its road.

2. *County railroad bonds — Subscription — Election — Ratification of, defects in.*—In a suit to enforce payment of bonds given by a county to a railroad company, in payment of subscriptions by the county to the stock of the company, although it appear that at the time the court authorized the subscription no election had been held to ascertain the sense of the tax-payers of the county in reference thereto, yet if it appeared that the county, by its duly authorized agent, voted on said stock subscription for more than twelve years, such action of the county was, for the purposes of this suit, a waiver of the defects in the original subscription. Moreover, the issue of the bonds, years after the time of the subscription, was a ratification thereof, and warranted a purchaser of them in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been complied with or waived.

Petition for mandamus.

Hunton, Moss & Sherzer, for relator.

I. The bonds sued on are negotiable. (2 Pars. on Bills and Notes, 34 and notes; *Craig v. City of Vicksburg*, 31 Miss. 216, 221, 247; 1 Wall. 95; 2 Wall. 110-122.)

II. Having issued such securities, it is too late now, even as against the railroad company, much more a "*bona fide* holder thereof," for the county to set up any defense based upon conditions precedent to subscription, or conditions in subscription; and the county, by issue of its bonds, is estopped from denying that power was properly executed. (33 Mo. 440-450; 36 Mo. 294; 3 Wall. 654; 4 Wall. 271, 274-5; 1 Wall. 83, 175, 291, 384; 1 Black, 386; 2 Black, 722-731; 21 How. 545; 43 Penn. St. 401-2; 43 Penn. 391.)

III. The act of said county in voting upon said subscription for over twelve years—from 1854 to 1867—is a complete waiver of all conditions. (36 Mo. 294; Const. of Mo.; Gen. Stat. 1865, p. 36, § 3.)

IV. The bonds were due and in hands of *bona fide* holder before any change in "present survey" as understood by the

Barrett, relator, v. The County Court of Schuyler county.

court—they were due in 1860. If there was an equity against the bonds, it arose after the paper was transferred, and after its maturity.

J. G. Blair, for respondent.

I. The bonds are not negotiable under the law in force at their issue. (R. C. 1855, p. 295, § 15; *id.* 320, § 2; *id.* 322, § 3.)

II. There being no election held, neither the County Court nor their agent had any power or authority in law to make the subscription. (Sess. Acts 1853, p. 135, § 29; R. C. 1855, p. 427, § 30; *Leavenworth and Des Moines R.R. Co. v. Platte County*, 42 Mo. 171.)

CURRIER, Judge, delivered the opinion of the court.

The agreed statement of facts filed in this cause shows that the county of Schuyler, in the month of December, 1854, or the following January, acting through its duly appointed agent, subscribed for five hundred shares of the capital stock of the North Missouri Railroad Company, amounting to \$50,000. This subscription was delivered to the officers of the company, and duly placed on file. It was subject to the following conditions, recited in the order of the County Court authorizing the subscription to be made, to-wit: "Provided said railroad is located on or near the present survey, and in compliance with the present charter, through Schuyler county, as has been surveyed." It further appears that on the 7th day of November, 1859, the Schuyler County Court, as a first payment on the stock thus subscribed, issued and delivered county bonds to the amount of \$15,000, which were purchased by the relator before their maturity, as the evidence shows. The bonds were in the following form, sealed and authenticated as the form indicates:

"\$1,000.

No. —

\$1,000.

"The County of Schuyler, in the State of Missouri, will pay to the North Missouri Railroad Company, or bearer, at their office in St. Louis, on the first day of March, 1860, one thousand dollars.

Barrett, relator, v. The County Court of Schuyler county.

“By order of the County Court. Given at Lancaster, this 7th day of November, 1859.

“CHARLES HALE, P. J. S. C. Court.

“Attest: J. B. ALVERSON, Clerk.”

[County Court seal.]

These bonds were duly presented for payment at maturity, and payment thereof refused, and no part of them has since been paid. The petition, among other things, recites the foregoing facts, and prays that a peremptory writ of *mandamus* may issue requiring the Schuyler County Court to assess and levy a tax for the payment of said bonds, with the interest thereon. The issue of the writ is resisted on two general grounds, namely: 1st. That the bonds are non-negotiable instruments, and therefore subject to all equities existing between the railroad company and Schuyler county; and, 2d. That the condition upon which the stock subscription was made has not been complied with in two particulars—first, as regards the location of the road, and, secondly, as to the time of its completion to a certain point, as provided in the charter. The first proposition is founded upon the statute in relation to bonds, notes, and accounts. (R. C. 1855, p. 320, §§ 2, 3.) The bonds in suit, it is true, do not contain the words “value received, negotiable and payable without defalcation,” and therefore fall within the letter of the provisions referred to; but that they fall within the aim and purpose of these provisions is questionable. In these enactments, the Legislature had in view classes of paper called into use for entirely different objects than that contemplated by the Schuyler county bonds—paper that is not usually employed in banking and commercial operations, and not adapted to or intended for such uses. But these bonds were issued and put in circulation evidently as commercial securities—securities that the railroad company might sell and use in raising funds to defray the cost, in part, of constructing their railroad. They purport, on the face of them, to be issued by the order of the Schuyler County Court, under the common seal, are payable to bearer at a future time, and import a consideration, although that consideration is not

Barrett, relator, v. The County Court of Schuyler county.

recited in the body of the instrument. Here are the ordinary elements of negotiability. In *Moran v. Miami County*, 2 Black, 722, the Supreme Court of the United States held that bonds, not essentially unlike those in question, "were commercial securities, though not in the accustomed forms of promissory notes and bills of exchange; that the parties intended them to be passed from hand to hand to raise money upon, so that the full title was intended to be conferred on any person who became the legal holder of them, and that the original maker had no equity to prevent a recovery." Every circumstance here recited is true of the Schuyler county bonds. (2 Redf. Railw. 604-5.) But it is not deemed necessary to turn the case on this point.

The respondent's second proposition is not available for the purpose of this defense. It is not a defense to be favored. The county, through its court, has issued its unqualified promise to pay whoever might be the legal holder or bearer of the instrument. That instrument was put upon the market, and, while current, has come to the hands of an innocent holder for value; for the agreed statement concedes that the relator is not to be charged with actual notice of any "conditions, defects, imperfections, or irregularities" connected with the stock subscription or the issue of the bonds. An objection stated in the return to the alternative writ, but not pressed in the argument, is that at the time the court authorized the subscription to the stock of the railroad company, no election had been held to ascertain the sense of the tax-payers of the county; but it is admitted that the county, by its "duly authorized agent, voted upon said stock subscription at the regular meetings of the railroad company, from the time of its subscription in 1854 to April, 1867," covering a period of more than twelve years. If there were defects in the original subscription, the subsequent action of the county, in representing and voting upon the stock subscribed, must be held, for the purposes of this suit, a waiver of such matters. Besides, the issue of the bonds in 1859 was a ratification of the subscription, and warranted the purchaser of them in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been

Parker, Ex'r of Block, v. Garnhart.

complied with or waived. (Flagg *et al.* v. Palmyra, 33 Mo. 440.) The decision in this case is an authority fatal to this branch of the defense. And see Hannibal and St. Jo. Railroad v. Marion County, 36 Mo. 294; Knox County v. Aspinwall *et al.*, 21 How. 539; 2 Redf. on Railw. 604, and cases cited. The objection that the railroad was not completed to Schuyler county in the time required by the charter, and that respecting the particular location, fall with the others, and for the same general reasons. But it may be added, in reference to these points, that the bonds became due and payable before the time expired for constructing the road to the given point; and it would be difficult for the court to determine, as a matter of law, or as an inference from other conceded facts, that a point within two and a half miles of Lancaster was not as "near" to that place as the condition to the stock subscription required. The word "near" is a relative term, and its precise import can only be determined by surrounding facts and circumstances. The general location of the road does not appear to have been so changed as to affect the interests of the county at large, although not as desirable for the particular town of Lancaster as a nearer route would have been.

On the whole, the defense to this suit does not appear to have either legal or equitable merits, and the peremptory *mandamus* is therefore awarded. The other judges concur.

CHARLES W. PARKER, Executor of ELEAZER BLOCK, Respondent,
v. JOHN H. GARNHART, Appellant.

1. *Bills and notes — Lands — Notes given for purchase money; deed of trust to secure — Verbal agreement to buy in land under given condition — Suit on notes, etc.* — Where the vendee of land paid a portion of the purchase money, and for the remainder gave his notes, secured by deed of trust on the property, testimony simply showing that the vendor expressed his willingness to exchange the notes for the land in case he could get a good title without a sale under the deed of trust, and that the property was sold six months after by the trustee, and bought in by the vendor, without showing any connection between the events, would not prevent the vendor from recovering judgment upon the notes, notwithstanding the apparent hardship to defendant of such a proceeding.

Parker, Ex'r of Block, v. Garnhart.

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, and *Glover & Shepley*, for appellant.

Sharp & Broadhead, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues on sundry notes drawn by the defendant and payable to the plaintiff's testator. The execution of the notes is admitted, but it is alleged in defense that the notes were given for real estate purchased of Block, deceased, to secure a portion of the purchase money; that these notes were secured by deed of trust on the identical land conveyed to the defendant by Block; that the defendant, in January or February, 1862, having then paid in all some \$800 of the purchase money, proposed to Block to take back the land and give up the remaining notes; that Block assented to this, and afterward, in August, 1862, bought in the land at trustee's sale, and had it conveyed to himself, as in execution of such arrangement. It is asked that the notes be canceled and delivered up to the defendant.

At the trial it appeared that the defendant therein, acting through an agent, made to Block the proposition stated in the answer; that Block signified his willingness to accede to it, provided he could get back a good title to the land without resorting to a trustee's sale for that purpose, Block at the time saying that he would consult his lawyer on the subject, and see if that could be done. This was the end of the negotiation. Nothing more appears to have been said in regard to the matter; nor does it appear that the defendant ever offered to fulfill his part of the alleged arrangement, or that he ever again communicated with Block in relation to the proposed exchange of the land for the notes, or that Block ever again communicated with the defendant.

It is perfectly evident that the facts recited did not impose the slightest legal obligation on either party. It was all mere talk. Nothing was done by either. It does not even appear that Block consulted his attorney, nor was he under any legal obligation to do so. But some six months after the defendant made his propo-

Reed et al. v. Ownby et al.

sition to Block, Block's trustee, in pursuance of the provisions of the deed of trust, advertised and sold the property at public vendue, and Block bid it in, and took a conveyance of it from the trustee in the usual way. Had this sale and conveyance any connection with the negotiation such as it was between the plaintiff and the defendant's agent in the preceding January or February? There is not a syllable of testimony to indicate that there was, or that suggests the idea that Block had the property sold and bought it in, in pursuance of any prior arrangement with the defendant to do so. The defense has nothing to sustain it except the fact that Block expressed his willingness to exchange the notes for the land in case he could get a good title without a sale under the deed of trust, connected with the fact that the property was sold six months after by the trustee, and bought in by Block. But there is no evidence showing that these two events had any connection, or that the latter was in any way induced or brought about by the former, or by anything that ever passed between the defendant and Block. There was no error in giving or refusing instructions, and there is nothing to justify a reversal of the judgment of the Circuit Court.

There may be something unconscionable in the enforcement of the payment of these notes, the lands for which they were given having, under the circumstances stated, passed back into the hands of the grantor in the original conveyance. However this may be, and notwithstanding the apparent hardship to the defendant, the judgment must be affirmed. The other judges concur.

WILLIAM W. REED *et al.*, Appellants, *v.* OWNBY and GUY,
Respondents.

1. *Mortgages and deeds of trust — Attachment — Unrecorded mortgages, when good against.*—An unrecorded mortgage on land is good against the lien of a subsequent attachment thereon, if recorded before judgment and execution sale in the attachment suit. (Davis v. Ownby, 14 Mo. 170, and Valentine v. Havener, 20 Mo. 133, affirmed; *vide* also, Potter v. McDowell, 43 Mo. 93.)
2. *Stare decisis.*—Where the law has been settled for many years, and has become a rule of property, and titles have been vested on the strength of it, the error of the law would have to be most palpable to justify this court in overruling previous decisions.

 Reed et al. v. Ownby et al.

*Appeal from Sixth District Court.**James Carr*, for appellants.

An unrecorded mortgage will not prevail over a subsequent judgment, although the mortgagee give notice of his mortgage before sale under the judgment. (Washington's Lessee v. Trousdale and the Banks, Mart. & Yerg. 385; Smith v. Jordan, 25 Ga. 687; Shepherd v. Burkhalter, 13 Ga. 443; Guerrant v. Anderson, 4 Rand. 208; Priest v. Rice, 4 Pick. 164; Davidson v. Cowan, 1 Dev. Eq. 474.) *A fortiori*, an unrecorded mortgage, of which an attaching creditor has no notice, will not prevail over a subsequent attachment. (Hill v. Paul, 8 Mo. 479; Reed v. Austin, 9 Mo. 713; Frothingham v. Stacker, 11 Mo. 77; Washington's Lessee v. Trousdale and the Banks, *supra*; Uhler v. Hutchinson, 23 Penn. 110; Jaques v. Weeks, 7 Watts, 261; Friedley v. Hamilton, 17 Serg. & R. 70; Hulings v. Guthrie, 4 Burr. 183; Melvin's Appeal, 32 Penn. 121; General Ins. Co. v. U. S. Ins. Co., 10 Md. 517; Call v. Hastings, 3 Cal. 179; Paine v. Mason, 7 Ohio, N. S., 198; Doyle v. Stevens, 4 Mich. 87; Barker v. Bell, 1 Ala. 375; Carpenter v. Allen, 16 La. An. 435; Barry v. McCarty, 15 Iowa, 510; Brazelton v. Brazelton, 16 Iowa, 417; Parret v. Shaubhut, 5 Minn. 323; Luch's Appeal, 44 Penn. 519; Handley v. Howe, 22 Maine, 560; 13 N. Y. 650; Williams v. Tatnall, 29 Ill. 553; Emerson v. Littlefield, 3 Fairf. 148; Stanley v. Perley, 5 Greenl. 369; 1 Dana, 186; 4 Bibb, 78; Curtis v. Root, 20 Ill. 53; Rose v. Maurice, 4 Cal. 173; Smith v. Randall, 6 Cal. 47; Dennis v. Barrett, *id.* 670; Wilson v. Shoenfelt, 34 Penn. 121; Sturtevant's Appeal, *id.* 149; Woodbury v. Fisher, 20 Ind. 387; Dunwell v. Bidwell, 8 Minn. 34; Rhines v. Baird, 41 Penn. 256.)

Howell, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment for the recovery of the possession of a piece of land lying in Monroe county. The plaintiffs

claim title under a sheriff's deed. From the record it appears that on the 13th day of August, 1861, plaintiffs commenced their suit by attachment, in the Monroe County Circuit Court, against one Frank Davis, and attached the land in controversy. On the 19th day of May, 1862, they obtained a judgment, on which execution issued; and at the May term, 1863, they purchased the same. At the institution of the attachment suit, so far as the records showed, the title was in Davis.

On the 21st day of March, 1862, Guy, one of the defendants, filed for record in the recorder's office of Monroe county a mortgage, executed, acknowledged, and delivered to him by Davis, for the same land, on the 15th day of April, 1861. On the 19th day of May, 1862, he obtained judgment of foreclosure of said land; and at the May term of the Circuit Court, 1863, purchased the land at sheriff's sale, made under the judgment of foreclosure. Ownby had no interest in the land, but was a tenant of Guy's.

Upon these facts being submitted to the court, a judgment was rendered for the defendants, which was affirmed in the District Court, and the case is now brought here by appeal. The only question is whether the lien acquired by the plaintiff in the attachment suit is entitled to priority over the rights of the mortgagee, although his mortgage was duly recorded before the plaintiffs obtained their judgment or purchased on execution at the sheriff's sale. This question is firmly settled in this State by two direct adjudications, holding that an unrecorded deed is good against a judgment if recorded before an execution sale under the judgment. (*Davis v. Ownby*, 14 Mo. 170; *Valentine v. Havener*, 20 Mo. 133.) The counsel for the plaintiffs admits that these authorities are directly against him, but asks this court to review the question and determine the law otherwise. This we are not at liberty to do. The law has been settled for many years; it has become a rule of property, and titles have been vested on the strength of it. Under such circumstances the error would have to be most palpable to justify this court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property; and they are not to be tampered with to suit the views of different

Spangler et al. v. The County Court of Clark county.

persons. I am aware that there are to be found most respectable cases in other States holding a doctrine somewhat different from the rulings of this court; and were the question *res nova*, they might be entitled to serious consideration. But it is no longer debatable or open, and we are unwilling to unsettle our own laws because some other courts have entertained different views.

Judgment affirmed. The other judges concur.

SAMUEL SPANGLER *et al.*, Relators, v. THE COUNTY COURT OF CLARK COUNTY, Respondent.

1. *Clark county — Removal of county seat — Construction of Sess. Acts 1865, p. 312, and R. C. 1855, p. 514, ch. 45.*— It would seem to have been the obvious purpose of the Legislature, in the sixth section of the act to re-locate the county seat of Clark county (Sess. Acts 1865, p. 312), to adopt the machinery provided by the act of 1855 (R. C. 1855, p. 514, ch. 45), where that machinery was not superseded by the express provisions of the former act. The two acts taken together must be understood and construed as providing that the County Court of Clark county should act on the petition of a majority of the legal voters of that county, and appoint five commissioners to select a site for the public buildings "within two miles of said town of Cahoka," and to do whatever else the act of 1855 required of them, not at variance with the act of 1865; and that when the commissioners had made the selection, and discharged the duties devolved upon them in this behalf, the County Court should order the removal of the county seat to the selected locality.

Petition for mandamus.

J. G. Blair, for relators.

Matlock, and Dryden, Lindley & Dryden, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a petition for a peremptory *mandamus* requiring the County Court of Clark county to make an order appointing five commissioners to "select a site * * whereon to locate the seat of justice of said county, and to discharge the duties" enjoined upon it by an act of the Legislature, passed February 20, 1865 (Sess. Acts 1865, p. 312), which act is set out in full in the petition.

Spangler et al. v. The County Court of Clark county.

The petition recites, substantially, that a majority of the legal voters of the county petitioned the court to make the removal contemplated by the act, and that the court, being satisfied that the act had been complied with in this respect, on the 7th day of April, 1865, made and entered of record an order of removal, and appointed a commissioner to receive donations of, or acquire by purchase, lands whereon to erect public buildings; that on the 8th day of June thereafter the court removed this commissioner and annulled his authority; that on the 3d day of February, 1869, the relators, being tax-payers, etc., of the county, applied to the court, in due form, for the appointment of five commissioners to select a site whereon to locate the public buildings and fix the seat of justice, as provided by the act of 1855 (R. C. 1855, p. 514, § 1); and that the court, by an order, of record, overruled the application and declined to make the appointment.

These are the material recitals and averments of the petition.

To this petition a demurrer is interposed, and the question is thus raised whether the petition states facts sufficient to justify the issue of the writ. That depends upon the construction to be given to the act of 1865 recited in the petition. This act (1865, p. 312, § 1) authorizes the County Court of Clark county to "remove the county seat * * from Waterloo to Cahoka, or to within two miles" of the latter place, "whenever a majority of the legal voters of said county, by petition, shall require the same to be done." The only other provision of the act bearing on this subject is contained in the sixth section, which declares that the act to provide for the removal of seats of justice, approved November 20, 1855 (R. C. 1855, p. 514), "so far as the same may be applicable, and not inconsistent with the act [of 1865], shall be in force and apply to the new county seat, and the County Court shall be in like manner governed thereby."

The first section of the act of 1855, thus referred to, provides that "whenever three-fifths of the taxable inhabitants of any county * * shall petition the County Court, praying the removal of the seat of justice thereof to a designated place, the court shall appoint five commissioners to select a site whereon to locate the seat of justice." The rest of the act is largely occupied in

Spangler et al. v. The County Court of Clark county.

defining the duties of these commissioners, and directing them therein. They are authorized to receive donations and make purchases of land, and to select the most suitable place "whereon to erect the public buildings;" but their selection of a locality for the public buildings is made subject to a popular vote, the machinery of which the act provides.

By comparison of the two acts it is found that one requires the County Court to act on the petition of "three-fifths of the taxable inhabitants" of the county; the other, on the petition of a "majority of the legal voters." By one a popular election is to finally determine the site of the new seat of justice; by the other, the County Court is empowered to make the removal without the intervention of such election. These are the material differences between the two acts, as respects the manner of effecting the proposed removal. The act of 1865 is obscurely and inaptly drawn, but it would seem to have been the purpose of the Legislature, in the sixth section of the act, to adopt the machinery provided in the act of 1855, where that machinery was not superseded by the express provisions of the former act. This section declares that the County Court shall be "governed" by the latter act so far as the same may be "applicable and not inconsistent" with the act of 1865. What was the purpose of that section if it was not intended thereby to adopt the provisions of the act of 1855 in regard to the appointment and duties of the five commissioners? They seem neither inapplicable to nor inconsistent with the act of 1865, but quite necessary to the full and most beneficial accomplishment of the purposes of that act.

The two acts taken together, as it seems to us, must be understood and construed as providing that the County Court of Clark county should act on the petition of a majority of the legal voters of that county, and appoint five commissioners to select a site for the public buildings "within two miles of said town of Cahoka," and to do whatever else the act of 1855 required of them, not at variance with the act of 1865; and that when the commissioners had made the selection, and discharged the duties devolved upon them in this behalf, the County Court should order the removal of the county seat to the selected locality. This inter-

Vail, contestor, v. Dinning, contestee.

pretation gives practical effect to the act of 1865, accomplishes its object beneficially, and sacrifices no rights.

In this view of the case, the demurrer must be overruled and the issue of the writ ordered. The other judges concur.

JAMES H. VAIL, Contestor, v. LOUIS F. DINNING, Contestee.

1. *Supreme Court, jurisdiction of*—*Not original touching litigation of private rights.*—It was never intended that this court should exercise original jurisdiction in matters of general litigation, or in contests respecting mere private rights.
2. *Supreme Court, jurisdiction of, generally appellate*—*Habeas corpus, etc., prerogative writs, variant from ordinary process.*—This court was designed to be strictly appellate in its character, duties, and functions, with certain marked and definite exceptions, such as cases of *habeas corpus, mandamus, quo warranto, prohibition*, etc. These are high prerogative writs, emanating from this court by direct application and by the authority of the sovereign power of the State. They are only issued when applied for in a proper case, and are wholly variant from that process of summons or notice by which one party brings an adverse party into court to determine a private right or to settle a matter of ordinary litigation.
3. *Circuit judge, contest for office of*—*Statute concerning, unconstitutional.*—Section 80, chapter 2, Gen. Stat. 1865, authorizing the contestor of the office of circuit judge to bring the issue originally before the Supreme Court by petition, without appeal or writ of error, invests it with a jurisdiction not authorized, but prohibited, by the constitution.
4. *Circuit judge, contest for office of*—*Does not warrant remedial writ.*—The contest for the office of circuit judge concerns a civil right, to be decided on the facts and issues, and does not call forth the extraordinary remedial writs of this court.
5. *Circuit judge, contest for office of*—*May be settled in lower courts.*—The law, as it now exists, affords an ample and complete remedy where the issues between parties contesting the office of circuit judge can be tried, and if the result is not satisfactory, an appeal will lie to this court; and the Legislature may also prescribe new and additional means for determining such contests. But this court can not assume jurisdiction, nor hear and determine cases, except on appeal or on writ issuing from this court.

G. I. Van Alen, and John F. Bush, for contestor.

I. The questions arising in this case concerning the regularity and legality of the election are questions of a political nature, and their determination is an exercise of political power. (State

Vail, contestor, v. Dinning, contestee.

ex rel. Bartley v. Governor Fletcher, 39 Mo. 388; *State ex rel.* Jackson v. Howard County Court, 41 Mo. 24.) Hence, the case of Foster v. State, 41 Mo. 61, has no application here.

II. The contestee's construction leaves the contestant no remedy. "*Ubi jus, ibi remedium.*" (Broom's Legal Max. 146 *et seq.*)

III. This court has power to issue other writs besides those named in the constitution. (Thomas v. Mead, 36 Mo. 232; *State ex rel.* West *et al.* v. Clark County Court, 41 Mo. 44.) This proceeding originates in a notice which is in the nature and performs the functions of an original remedial writ within the meaning of the constitution, and was designed by the Legislature to meet new cases arising under our elective system. The requirement that writs shall "run in the name of the State of Missouri" is not mandatory, but directory. (Davis v. Wood, 7 Mo. 162; Wethers v. Rogers, 24 Mo. 340.)

Glover & Shepley, for contestee.

I. This is not a case where this court has original jurisdiction. (*Vide* art. VI, §§ 2, 3, of Constitution, Gen. Stat. 1865, pp. 35-6.) (1) No writ of any sort is here issued. If the notice in this case be regarded as filling the place of a writ, it is a writ which the contestor is entitled to on his own motion, like a writ of summons at law or subpoena in chancery. But *habeas corpus*, *mandamus*, *quo warranto*, and *certiorari* are all of them extra writs, that issue only on special application to the court, and on a showing of merits. (2) This proceeding not being one of these writs, to be sustained at all should appear to be some other original remedial writ of like kind. Evidently a writ of prohibition is of like kind, and is embraced in "other original remedial writs," and the Legislature might frame any other writ of like kind, and this court would have constitutional power to issue and hear them; but no process to begin a contest about an election would be of like kind. The right to have the benefit of an election is an ordinary civil right, requiring no extraordinary process to assert it more than the right to chattels or lands.

Vail, contestor, v. Dinning, contestee.

WAGNER, Judge, delivered the opinion of the court.

At the general election in November last, Vail and Dinning were candidates for the office of circuit judge in the fifteenth judicial circuit; and Dinning having received a majority of the votes cast, Vail proceeded to contest the election by giving notice within the time and in the manner prescribed by the statute. A motion is now made on behalf of Dinning to dismiss the case from the docket, because: *first*, this court has no jurisdiction of the subject matter of this proceeding; *second*, if there is jurisdiction of the subject matter, there is no sufficient petition in the case to give the contestor a standing in court.

That the petition is palpably defective is certainly true; but if the question of jurisdiction is determined adversely to the contestor, it is useless to examine it. The proceeding was commenced under section 80 of the general statute in regard to elections, which provides that if any person contest the election for circuit judge, he shall present a petition to the Supreme Court at the first term holden next after the election, or to some judge thereof in vacation, within forty days after such election, setting forth the points on which he will contest the same, and the facts he will prove in support of such points. Subsequent sections point out the manner of taking testimony, and the act declares that all contested elections for judges of the Circuit Court shall be heard and determined by the Supreme Court. This provision was first adopted in the statute law of this State in the revision of 1855, and was imported thence into the General Statutes of 1865. The question of jurisdiction is now raised for the first time, and till very recently no case involving the subject matter was ever presented to this court. At the February term last, John Wilson presented his petition to contest the right of Lucas to the judgeship of the fifth judicial circuit, but the petition was dismissed, the notice not having been served in time.

In the first place, it must be acknowledged that the jurisdiction of this court is defined and limited by the constitution. It has such powers and jurisdiction as the constitution has conferred upon it—no more, no less. It can not shirk any duty imposed

Vail, contestor, v. Dinning, contestee.

on it by the organic law, nor can it extend its powers to take cognizance of any matter not within the scope of its limited authority. The Legislature can neither add to nor diminish its rightful jurisdiction. That body can invest it with no original jurisdiction when it is not given by the constitution, nor can they deprive it of its appellate jurisdiction.

The second section of article VI of the constitution declares that the Supreme Court, except in cases otherwise directed by the constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under the instructions and limitations in the constitution provided. Section 3 provides that the Supreme Court shall have a general superintending control over all inferior courts of law, and shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs, and to hear and determine the same. The above sections comprise the whole jurisdictional power of this court.

It was never intended that this court should exercise original jurisdiction in matters of general litigation, or in contests respecting mere private rights. The uniform construction placed upon the provisions in our constitution, and on like provisions in other States, is against the right, and wherever the attempt has been made it has been disclaimed by the courts. In *Foster v. State* (41 Mo. 61), a dispute arose between the public printer and the State authorities respecting the settlement of an account, and the Legislature passed an act for the submission of the matter in controversy to the adjudication of this court, on an agreed statement of facts. We declined taking any cognizance of the case, as it was in the form of an original action, and did not evoke any appellate jurisdiction.

In Illinois, the Legislature passed an act, one section of which was as follows: "The parties in any suit or proceeding at law or in chancery, in any circuit court, may make an agreed case containing the points of law at issue between them, and file the same in the said court, and the said agreed case may be certified to the Supreme Court by the clerk of such Circuit Court, without certifying any further record in the case; and upon such agreed case being so certified and filed in the Supreme Court, the appellant

Vail, contestor, v. Dinning, contestee.

or plaintiff in error may assign errors, and the case shall then be proceeded in, in the same manner as it might have been had a full record been certified to the said Supreme Court." Under this section of the statute an agreed case was made by parties, and certified up by the clerk of the Circuit Court, without any previous decision having been given in the court below.

The Supreme Court (*Crull v. Keever*, 17 Ill. 246) refused to entertain the case, and, although they said it was not the intent of the act that it should be brought up in that manner, they went further, and said that the word "appellate" in the constitution was used in contradistinction to "original." It was intended to invest the court with supervisory power only, except where original jurisdiction was expressly given. It contemplated some action, decision, or determination of some officer or inferior tribunal, by which the right of some party could be affected, to re-examine and reverse which he might be allowed to appeal. The appellate power conferred was to correct errors committed by some inferior jurisdiction, and no error could be committed till a decision was made. There must be something to appeal from before an appellate power could be exercised.

It is very plain that were it not for the express exceptions contained in the constitution, this court could exercise no original jurisdiction. As it is, its power is confined to certain specified writs, and others of a like remedial nature. It may not be easy to specify all the writs which would properly come within this designation. It is obvious, however, that reference is made to writs of the same class or genus. The writs must be both original and remedial. In *Lane v. Charless* (5 Mo. 285), it was held that an injunction was not one of the original remedial writs provided for. In *Attorney-General v. Blossom* (1 Wis. 317), the Supreme Court of Wisconsin, in discussing this question, says: "These writs differ essentially in their character and objects from ordinary writs issued by the courts in the regular and usual administration of law between parties. They go to accomplish peculiar and specific objects, carrying with them the special mandate of the sovereign power, addressed to the person, corporation, or officer, requiring them to do or not to do,

Vail, contestor, v. Dinning, contestee.

to proceed or to desist, to perform the duty required by law, or to abstain from the exercise of powers without lawful authority, etc. They bear no resemblance to the usual processes of courts by which controversies between private parties are settled by the judicial tribunals of every grade."

This court was designed to be strictly appellate in its character, duties, and functions, with certain marked and definite exceptions. The framers of the constitution doubtless saw that contingencies might arise when it would not only be fit but indispensably necessary that this court should interpose its process in the first instance. There may be occasions when not only the interests of the citizen, but the safety and welfare of the State, may depend upon the issuance from this tribunal of its original remedial process; and for such exigencies provision was made. *Habeas corpus, mandamus, quo warranto, prohibition*, etc., are high prerogative writs, emanating from this court by direct application and by the authority of the sovereign power of the State. They are only issued when applied for in a proper case, and are wholly variant from that process of summons or notice by which one party brings an adverse party into court to determine a private right or to settle a matter of ordinary litigation.

It is not claimed that the matter in contest here comes within any of the specified delegations of power to issue original remedial writs; and this being so, it was wholly incompetent for the Legislature to attempt to invest this court with jurisdiction not given to it by the constitution, but, on the contrary, as I think, prohibited by that instrument. The proceeding was instituted not by any writ issuing from this court, but by notice on the part of the contestor that he would contest the right and title of the contestee to an office. The subject of contention between the parties is a civil right, to be decided on the facts and issues, and does not call forth the extraordinary remedial writs of this court. In principle, the case would not be different if it was a contest for the office of constable. If jurisdiction can be conferred on this court to hear and determine contests for the office of circuit judge, it can also be conferred to determine contests as to county judges, clerks, sheriffs, and, in fact, every officer in

 Foster et al. v. Dunklin.

the State. It requires no argument to show that such was never the intention of the constitution; and its express language is opposed to it. As the case was not commenced by writ—the only way in which it could be recognized here as an original proceeding—there is nothing on which appellate jurisdiction can attach. There is neither appeal nor writ of error. There is no judgment of an inferior tribunal to re-examine, revise, or reverse.

The counsel for the contestor has assumed that if this motion is sustained and the proceeding dismissed, he will be entirely without remedy. But this is not true. The law, as it now exists, affords an ample and complete remedy in tribunals where the issues between the parties can be tried, and, if the result is not satisfactory, an appeal will lie to this court; and the Legislature may also prescribe new and additional means for determining contests of this description. But this court can not assume jurisdiction, nor hear and determine cases, in any other manner than that provided for in the constitution.

In my opinion, the motion should be sustained and the proceeding dismissed. The other judges concur.

EMORY S. FOSTER *et al.*, Plaintiffs in Error, v. JAMES L. DUNKLIN, Defendant in Error.

1. *County courts—County roads, establishment of—Appeals on merits not inquired into.*—County courts alone have power to establish new county roads, change roads for purposes of cultivation, and vacate roads; and their discretion in these matters can not be reviewed by the Circuit or any other court. No appeal will lie, even as to assessment of damages, since the act of March 23, 1868. (Adj. Sess. Acts 1868, p. 158, § 53.) Any one directly interested may appeal to the Circuit Court on questions of law, under section 2, ch. 136, Gen. Stat. 1865; but the appellate jurisdiction given that court by the statute does not involve the right to review the discretion of the County Court, or to pass upon anything but the legality of its proceedings. If the County Court has conformed to the law, as shown by its record, its action should be affirmed. The merits of the question can not be examined.
2. *County courts—County roads—Petitioners for must pay what costs and expenses.*—The County Court is authorized to establish roads, with or without petition. If established by petition, all that is required of petitioners by way of expense is, first, to pay the county clerk his fees for reading and filing

Foster et al. v. Dunklin.

the petition, recording orders and making copies, and, on order of court, to pay into the county treasury the damages assessed, as a condition precedent to opening the road. No other charges can be imposed upon them.

3. *County courts—County roads—Decision of court touching, who may appeal from.*—The petitioners for establishing a new county road have no such interest in the matter as to authorize making them parties to an appeal or writ of error from the decision of the County Court touching the same, and liable to judgments in the appellate court. Only those whose private rights are affected—whose property is taken—have the power of appeal.

Error to the Second District Court.

Jno. L. Thomas, for plaintiffs in error.

J. J. Williams, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The County Court of Jefferson county, upon the petition of plaintiffs in error, established a new road across the land of the defendant in error, for which the compensation of fifteen dollars was awarded him, the commissioners deciding that the benefits derived by him from the road equaled the other damages. He appealed to the Circuit Court, which tried the case *de novo* and affirmed the proceedings of the County Court, and thence to the District Court. The last court reversed the action of the other courts, and rendered judgment against the petitioners, and they bring the case up by writ of error. The defendant files his motion to dismiss the writ, for the reason that the plaintiffs have no such interest as will entitle them to its benefit. The motion is overruled, for the reason that these parties were brought into the Circuit Court and into the District Court by defendant Dunklin, and judgment rendered against them in the latter court. If they have no such interest in the matter as to authorize them to appeal from the action of the County Court, it does not follow that if they are brought into the Circuit and District Courts against their will, and personal judgment rendered against them, they may not ask us to review that judgment.

There seems to have been a general misapprehension of the law pertaining to this matter. On appeal to the Circuit Court, the whole question before the County Court was inquired into,

Foster et al. v. Dunklin.

and witnesses examined upon the expediency of establishing the new road. This was beyond the province of the Circuit Court. The County Court has exclusive jurisdiction in that matter. It alone has power to establish new county roads, change roads for purposes of cultivation, and vacate roads. No appeal is allowed from its decision in this matter. The law well assumes that from the constitution of this court, the residence of its members within the county, and their knowledge of its wants, it is more competent to decide these questions correctly than an appellate tribunal. Hence, the discretion of the County Court in establishing the road can not be reviewed by the Circuit or any other court.

Previous to the act of March 23, 1868, appeals were allowed from the assessment of damages ; but, by that act (section 53), if a person over whose land the road passes shall be dissatisfied with the damages allowed him by the road commissioner, he may demand a trial and assessment of damages, by jury, in the County Court ; and no appeal is allowed from that assessment. Thus the whole matter is now left to the County Court. But still the Circuit Court, upon application of a person entitled to appeal, may exercise its appellate jurisdiction over the action of County Courts, given by section 2, chapter 136, of the General Statutes.

But the jurisdiction does not involve the right to review the discretion of the County Court, or to pass upon anything but the legality of its proceedings. If the County Court has conformed to the law, as shown by its record, its action should be affirmed. There is no provision for a bill of exceptions or for bringing anything before the Circuit Court, except the record proper ; nor can the merits of the question be examined. (*St. Louis v. Lind*, 42 Mo. 348.)

In the appeal to the Circuit Court the petitioners for the road were made defendants, and they were also brought into the District Court. Is there any authority for this ? There can be no question as to who may appeal. Any one directly interested, any one whose property is taken, may bring the matter before the higher courts. But has he any right to bring into court the petitioners for the road, and subject them, against their will, to

the costs and expenses of the suit? If so, it must be from some provisions of the law. The County Court is authorized to establish roads, with or without petition. If established by petition, all that is required of the petitioners by way of expense is, first, to pay the county clerk his fees for reading and filing the petition, recording the orders (Gen. Stat. 1865, ch. 32, § 6), and making copies. Also, the County Court has the power to require them to pay into the county treasury the damages assessed, as a condition precedent to opening the road. Yet this is optional on their part, and no other charges can be imposed upon them. If the petition is granted or refused, the matter is ended so far as they are concerned. They can not appeal or bring writ of error, for they have no such interest in the matter as will entitle them to do so. Only those whose private rights are affected—whose property is taken—have this power. (*Overbeck et al. v. Galloway*, 10 Mo. 364, and cases cited; *Bernard v. Callaway County Court*, 28 Mo. 37.) We find no authority in law for making the petitioners parties to the appeal, and rendering judgment for or against them. Their interest in the road is only in common with that of others; and, because certain contributions are required of them, other liabilities are not to be inferred.

The proceedings in the County Court were all regular. The petition for the road contains everything the statute requires; the notice was regular, and all the orders of the court; the report of the road commissioner, with the accompanying survey and field-notes of the county surveyor, the release of right of way, etc., are more definite and clear than in a majority of such cases that have come under my observation, and I see no material requirement of law not complied with. The Circuit Court, then, did right in affirming the action of the County Court, notwithstanding improper parties were brought before it; but it had no right to try the questions of fact over again. Instead of passing upon the record of the County Court, it proceeded to hear the whole matter *de novo*, which was outside of its jurisdiction, and rendered judgment for costs against respondent Dunklin. So far as concerns the costs made in the review of the record below and affirmance of judgment, the court was right, and the judg-

 Caldwell v. Layton et al.

ment should stand, notwithstanding improper parties were brought in; but all its proceedings in the trial of the merits were outside the law, and no judgment should be rendered for the costs of those proceedings.

The judgment of the District Court is reversed; and the judgment of the Circuit, affirming that of the County Court, is affirmed; but its judgment for the costs of subpoenas and witnesses, and other proceedings in the trial upon the merits, is reversed. The other judges concur.

HENRY L. CALDWELL, Plaintiff in Error, v. HENRY J. LAYTON et al., Defendants in Error.

1. *Partition, sale in—Dower, assignment of—Sheriff's return, construction of.*—Suit was brought by the heirs of David L. Caldwell for the partition of certain land, in which dower had been assigned to his widow, Margaret Caldwell. The petition set forth that the petitioners were the owners of certain property, describing its boundaries. The court ordered absolute sale of the premises. They were accordingly advertised and sold; and the sheriff's deed, after reciting the order, advertisement, sale, etc., conveyed to the purchasers "all the right, title, claim, and interest of said petitioners in said petition mentioned, in and to said described tract of land so sold as aforesaid," etc. But the sheriff, in his return of the sale, declared that all the land was sold "except so much of the same as was heretofore assigned to Margaret Caldwell, widow of said David L. Caldwell, as her dower interest in said tract." *Held*, that the return of the sheriff, taken in connection with his deed and the other proceedings in partition, should be construed to mean: "except such interest in the same as was heretofore assigned," etc., "as her dower interest in the tract," and that the portion of land assigned as dower was not thereby expressly reserved to the widow.
2. *Contracts, interpretation of—Determined from obvious intention, as derived from all parts.*—Mere verbal criticism should not be resorted to in interpreting contracts or legal proceedings. Courts should be governed by their obvious intention, as derived from all parts of the instrument or record.
3. *Contracts—Sheriffs' sales—Parol testimony as to declarations of sheriff at time of, how shown.*—Parol testimony as to declarations of the sheriff at the time of a partition sale, in order to explain the meaning of his deed, is improper, because its introduction is an attempt, collaterally, to impeach the record. The sale could have been set aside for cause by a direct proceeding in the same court, and, in such case, parol testimony of anything that occurred at the sale would be admissible.

Error to Second District Court.

Cissel & Noel, and *Garesche & Mead*, for plaintiff in error.

Robbins & Watkins, and *Glover & Shepley*, for defendants in error.

I. The sheriff intended to except the dower interest of Mrs. Caldwell, and nothing more.

II. Oral testimony as to declarations, actions, or omissions of the sheriff was incompetent to affect the case. (*Jackson v. Croy*, 12 Johns. 429; *Jackson v. Vanderheyden*, 17 Johns. 168.) The only remedy in such case is to make the court, by a direct and timely application, to set aside the sale and deed of the sheriff. It can not be done collaterally. (*Jackson v. Sternberg*, 20 Ind. 49; *Snyder v. Snyder*, 6 Bin. 483; *Jackson v. Roberts*, 7 Wend. 87; *Reed v. Heirs of Austin*, 9 Mo. 722.)

BLISS, Judge, delivered the opinion of the court.

This is an action for possession of a parcel of land embraced in No. 442 of Bois Brule Bottom, in Perry county, the plaintiff claiming as heir of David L. Caldwell, deceased. Layton claims only as lessee of the heirs of Alfred Paddock, who are also made parties. In 1837, dower in the real estate of said David L. Caldwell was assigned to his widow Margaret out of this tract, and in 1846 his heirs presented their petition to the proper court for partition of the land and slaves of their ancestors. The petition describes all the land of the estate, including that in No. 442; makes no mention of the dower interest or of its assignment to the widow, but, in describing those interested in the estate, mentions "Margaret Caldwell, his widow, since intermarried with James T. Hamilton." The order of sale, the advertisement, and the sheriff's deed all describe the land in No. 442 as in the original title deed of Caldwell, and no allusion is made to any interest of the widow carved out of it; but in the report of his sale to the court, the sheriff uses this language. After describing the land by boundaries, the report adds: "Except so much of the same as was

Caldwell v. Layton et al.

heretofore assigned to Margaret Caldwell, widow of said David L. Caldwell, as her dower interest in said tract." Mr. Hamilton, the then husband of Margaret, bid off the land, and afterward conveyed it to Alfred Paddock. The controversy arises out of the meaning of this return, the plaintiff claiming that the reversionary interest of Caldwell's heirs in that portion of 442 assigned as dower was not sold, but expressly reserved; while the defendants claim that this was merely a reservation of the dower interest of the widow, and that everything else was sold. The courts below sustained the latter view, and gave judgment against the plaintiff.

Were we considering this report alone, there would at least be great ambiguity in the language, and we might be compelled to hold that the reversionary interest of Caldwell's heirs was expressly reserved from the sale. But if the order of sale, advertisement, and sheriff's deed are to be considered, all being parts of and a consummation of the transaction, the intention becomes apparent.

The petition for partition sets forth that the petitioners are the owners of five hundred arpents, the north half of No. 442, describing its boundaries. The court orders the absolute sale of the premises, they are advertised accordingly; and the sheriff's deed, after reciting the order, advertisement, sale, etc., conveys to the purchaser "all the right, title, claim, and interest of said petitioners in said petition mentioned, in and to said described tract of land so sold as aforesaid," etc. The return of the sale, with the interpretation claimed—so contrary to all the acts of the parties and the orders of the court—should not receive that interpretation if one can be given it in harmony with the other parts of the transaction. Must the sheriff, then, have meant "except that part of the same, the use of which was heretofore assigned," etc., "as her dower interest in the tract"? Or may he not have meant "except such interest in the same as was heretofore assigned," etc., "as her dower interest in the tract"?

Mere verbal criticism should not be resorted to in interpreting contracts or legal proceedings. We must be governed by their obvious intention, as derived from all parts of the instrument or

State ex rel. Attorney-General v. Steers.

the record. That intention is obvious in the present instance, nor is it inconsistent with a grammatical scrutiny of the sentence itself. "So much of the land as was assigned as her dower interest" does not necessarily describe the land out of which was carved that interest. The connecting and modifying particles "as," "as," call for both the assignment and the interest assigned.

Light is thrown upon the intention of the sheriff when he says that the land was offered for sale in pursuance of the order and advertisement, as, indeed, he could offer it in no other way. He was bound to sell, if he sold at all, the whole interest of the heirs in the land.

The parol testimony as to the declarations of the sheriff at sale can not be considered by us, both because of its uncertain and contradictory character, and because it is an attempt collaterally to impeach the record. The sale could have been set aside for cause by a direct proceeding in the same court, and parol testimony of anything that occurred at the sale would have been admissible.

Judgment affirmed. The other judges concur.

STATE *ex rel.* ATTORNEY-GENERAL, Petitioner, *v.* JOHN H. STEERS, Defendant.

1. *Quo warranto*—*Subject to general rules of pleading.*—An information in nature of a *quo warranto* is a pleading which must be answered or demurred to, and the general rules of pleading are applicable to proceedings therein.
2. *Quo warranto*—*Pleadings in*—*Allegations of, should be denied*—*Elections*—*Title to office derived from election, not commission*—*Sheriff of Ralls county.*—Where an information in the nature of a *quo warranto* charged that defendant was holding and exercising the office of sheriff by virtue of the election of 1868, and in consequence of a certificate wrongfully issued by the clerk of the County Court, upon which a commission issued; an answer that defendant was duly elected in 1866, and that no successor had been qualified, was bad, for duplicity, and might be construed to mean that he was holding under either election, for the reason that no person had succeeded him in office. The allegation in the petition should have been denied. A person derives his title to an office by his election, and not by his commission; and if he

¹ State ex rel. Attorney-General v. Steers.

holds and exercises the functions of an office without having been legally elected, it is an unlawful holding, and he may be ousted at the instance of the State, notwithstanding his commission.

3. *Elections — Officer can not hold by unlawfully detaining commission of his successor.*— Although by force of existing law an officer holds until his successor is elected and qualified, yet if, by unlawfully detaining his certificate and commission, he prevents the person legally entitled thereto from qualifying, he will not be allowed to set this up in defense, and reap a reward from his own wrong.
4. *Elections — Legality of votes determined by intention of voters — Defects in certificate supplied, how.*— In determining the legality of votes, a literal compliance with prescribed forms is not required in any case if the spirit of the law is not violated; and the governing principle in all cases is clearly to ascertain the intention of voters. If a defect exists in the certificate of election, that may be supplied at any time by the judges and clerks, whose duty it is to make the same before the vote is counted.
5. *Elections, act concerning — Duties under simply ministerial.*— Under section 25 of the act touching elections (Gen. Stat. 1865, ch. 2, p. 63), no power is given to the clerk to adjudge whether votes are legal or illegal, but the simple ministerial duty to cast up and award the certificate to the person having the highest number of votes. To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims. To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties without notice or opportunity to be heard. The exercise of such a power is subversive of the rights of the citizen, and fatal to the elective franchise.
6. *Elections — Tribunal provided by law for determining validity of votes.*— The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proof.

Johnson, Attorney-General, and Geo. H. Shields, for relator.

I. On an *ex-officio* information in the nature of a *quo warranto*, the court will look beyond the relator's certificate of election and commission, and, unless he has been legally elected, will give judgment of ouster. (The People *ex rel.* Benton v. Vail, 20 Wend. 12; The People *ex rel.* Van Vourt v. Van Slyck, 4 Cow. 297; The People *ex rel.* Yeates v. Ferguson, 8 Cow. 102; Attorney-General *ex rel.* W. H. Carpenter v. Ely, 4 Wis. 420.)

II. This irregularity can be cured by the testimony of the clerk, judges of election, or other parol evidence. (4 Wis. 420.)

III. The general rules of pleading apply to informations.

State ex rel. Attorney-General v. Steers.

(The People v. Clark, 4 Cow. 95; 23 Wend. 193, 223; 2 Watts & Serg. 407; 4 Seld. 62; 26 Mo. 496.)

IV. The plea that respondent was elected in 1866, and entered the office under competent authority, is no defense to the allegations in this information. (The People *ex rel.* Benton v. Vail, 20 Wend. 12; The People v. Van Slyck, 4 Cow. 291; The People v. Ferguson, 8 Cow. 102; The People v. Jones, 17 Wend. 81.)

Dryden, Lindley & Dryden, for defendant.

WAGNER, Judge, delivered the opinion of the court.

The attorney-general, on behalf of the State, appears and files an information in the nature of a *quo warranto*, in which, among other matters, he states that at the general election held in this State on the third day of November, 1868, in the various counties, for State and county officers, one Samuel C. McCune, and defendant John H. Steers, were candidates, and the only candidates, in the county of Ralls, for the office of sheriff of said county; that McCune received a majority of all the legal votes cast for said office, in the said county, at that election, and that the judges and clerks of election in the various election districts in said county so certified to the county clerks of said county; that, notwithstanding the fact that said McCune received the majority of all the legal votes cast for said office of sheriff, the county clerk and board of county canvassers, unlawfully, wrongfully, for alleged informality and illegality, rejected and refused to count the votes, as certified by the judges and clerks of election, cast for said office in Jasper election district, in said county; that the said defendant Steers, by the said illegal and wrongful action of the county clerk in refusing to count and take into consideration the said votes and poll-books of Jasper election district, illegally obtained from the county clerk of said county his certificate of election from said clerk, and on the said certificate of election the governor of the State issued his commission to the defendant as sheriff of said county, under which commission the said defendant now holds and executes the duties of the said office of sheriff.

The information then specifies the number of votes given, showing that, upon a counting of the whole vote of Ralls county, McCune was legally elected, and that, by the act of the clerk in throwing out the vote of Jasper election district, the result was changed, and a majority left for the defendant.

A judgment of ouster is demanded against the defendant, for the reason that he is usurping and exercising the duties of an office to which he has no just or legal claim.

The defendant, in answer, sets up the plea that at the regular election, in 1866, he was a candidate for the office of sheriff in Ralls county, and was duly elected; that he received a certificate of such election from the clerk of the County Court of said county, and that thereon he was duly commissioned by the governor to serve for two years, and until his successor should be duly elected and qualified; and the defendant further alleges that, in pursuance of his said election in 1866, and by authority of the said commission, he accepted the said office of sheriff, and still holds and executes said office, no successor to the defendant in said office having been duly elected and qualified, and the defendant not having been removed for malfeasance.

Upon these pleadings the case stands in this court. The information expressly alleges that the defendant is holding and exercising the functions of the office by virtue of the election of 1868, and in consequence of a certificate wrongfully issued by the clerk of the County Court, upon which a commission was issued. There is no express denial of the averment, but there is an answer—argumentative, evasive, and negative in its character—stating that the defendant holds said office, no successor to him having ever been elected and qualified.

The information is a pleading which must be answered or demurred to, and it has been decided that the general rules of pleading are applicable to proceedings upon an information in the nature of a *quo warranto*. (People v. Clark, 4 Cow. 95; State ex rel. v. Bernoudy, 36 Mo. 297; State v. Messmore, 14 Wis. 115.)

The evasive answer, that no successor to the defendant had ever been qualified, is full of duplicity, and may be construed to

mean that he holds under either election, no other person having succeeded him in the office. The allegation in the information is a plain, simple one, requiring a denial, which the defendant has not seen proper to make. A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is unlawful holding, and he may be ousted at the instance of the State, notwithstanding his commission. (*Bashford v. Barstow*, 4 Wis. 567.)

In the case of *The People v. Van Slyck* (4 Cow. 297), it was determined that an information in the nature of a *quo warranto* would lie against one intruding into the office of sheriff in consequence of an unlawful decision of the county board of canvassers, the duties of the board being ministerial, and not judicial. It is true that by force of existing law the officer holds until his successor is elected and qualified; but if, by unlawfully detaining his certificate and commission, he prevents the person legally entitled thereto from qualifying, he will not be allowed to set this up in defense, and reap a benefit from his own wrong.

The question, then, arises, by what authority did the county clerk, acting as a mere canvassing officer, assume to determine the legality of the vote in the Jasper election district? Although the vote might have been informally certified, that would make no difference. Officers should look at substance, and not at form. A literal compliance with the prescribed forms is not required in any case if the spirit of the law is not violated; and the governing principle in all cases is to clearly ascertain the intention of the voters. If a defect existed in the certificate, that might be supplied at any time by the judges and clerks, whose duty it was to make the same before the vote was counted. The statute requires that within eight days after the close of each election the clerk of each county court shall take to his assistance two justices of the peace of his county, or two justices of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes a certificate of election. (Gen. Stat. 1865, p. 63, § 25.) Here is

State ex rel. Attorney-General v. Steers.

no discretion given—no power to pass upon and adjudge whether votes are legal or illegal—but the simple ministerial duty to cast up and award the certificate to the person having the highest number of votes. If the clerk has sufficient mathematical ability to correctly count up the returns, he is perfectly qualified for his office, for that is the only duty devolved on him by law. To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims. To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties, without notice or opportunity to be heard—a thing which the law abhors and prohibits. Admit the power, and there will be no uniformity. One canvassing officer will reject for one thing, and another for a different matter; and no man can tell whether he is legally elected to an office until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen, and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proof. When a ministerial officer leaves his proper sphere, and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation. In this case it would have been more decent and seemly for the clerk to have confined himself to the discharge of the duties pointed out by law, and not to have attempted the exercise of powers which were never intrusted to him.

I have examined, with a good deal of research, the authorities, and have never been able to find a single one that held otherwise than that the canvasser acted ministerially; but they are unanimous and decisive, declaring him to be a ministerial officer, and nothing else. (*Mayo v. Freeland*, 10 Mo. 629; *State v. Harrison*, 38 Mo. 540; *State v. Rodman*, 43 Mo. 256; *Ex parte Heath*, 3 Hill. 42; *Brower v. O'Brien*, 2 Ind. 423; *People v. Hilliard*, 29 Ill. 413; *People v. Jones*, 19 Ind. 357; *Ballou v.*

 State ex rel. Attorney-General v. Bishop.

York County Commissioners, 13 Shep. 491; Thompson v. Circuit Judge, 9 Ala. 338; People v. Kilduff, 15 Ill. 492; O'Farrell v. Colby, 2 Minn. 180; People v. Van Cleve, 1 Mich. 362; People v. Van Slyck, 4 Cow. 297; Morgan v. Quackenbush, 22 Barb. 72; Dishon v. Smith, 10 Iowa, 212; People v. Cook, 14 Barb. 259; 4 Seld., S. C., 67; Hartt v. Harvey, 32 Barb. 55; Attorney-General v. Barstow, 4 Wis. 567; Attorney-General v. Eli, 4 Wis. 420; State v. Governor, 1 Dutch. 331; State v. Clerk of Passaic, *id.* 354; Marshall v. Kerns, 2 Swan, 68; People v. Pease, 27 N. Y. 45; Head's case, 25 Ill. 325.)

The record abundantly shows that the defendant has no legal right to the office which he is now holding, and judgment of ouster will therefore be entered against him, with costs. The other judges concur.

 STATE *ex rel.* ATTORNEY-GENERAL v. WM. D. BISHOP.

1. State *ex rel.* Attorney-General v. Steers, *ante*, p. 223, affirmed.

Application for quo warranto.

H. B. Johnson, Attorney-General, and Geo. H. Shields, for relator.

Dryden, Lindley & Dryden, for defendant.

WAGNER, Judge, delivered the opinion of the court.

The information in this case alleges that the defendant has unlawfully usurped and intruded into the office of assessor of Ralls county. The record exhibits the same facts and the same question which we have just passed upon in the case of The State v. Steers. In accordance with the opinion therein expressed, judgment of ouster will be rendered against the defendant, with costs. The other judges concur.

State ex rel. Blenkinship v. County Court of Texas County.

STATE *ex rel.* ATTORNEY-GENERAL v. GEO. C. HAYS.

1. State *ex rel.* Attorney-General v. Steers, defendant, *ante*, p. 223, affirmed.

Application for quo warranto.

H. B. Johnson, Attorney-General, and Geo. H. Shields,
for relator.

Dryden, Lindley & Dryden, for defendant.

WAGNER, Judge, delivered the opinion of the court.

This is an *ex-officio* information by the attorney-general, charging the defendant with unlawfully intruding into and usurping the office of treasurer of Ralls county. The record presents the same question and the same state of facts as existed in The State v. Steers, just decided by this court.

Judgment of ouster will therefore be rendered against the defendant, with costs. The other judges concur.

STATE *ex rel.* JOHN R. BLENKESHIP, Relator, v. COUNTY COURT
OF TEXAS COUNTY, Respondent.

1. *Mandamus*—County treasurer, bond of; rejection of, creates no vacancy.—

Where A. was duly elected to the office of county treasurer, although he may have filed an insufficient bond, the action of the County Court in proceeding to reject the bond and declare the office vacant on the day when the bond was rejected, and appointing another person to fill the office, was totally unwarranted. If the time originally prescribed by law for filing the bond had expired when the proceedings were had, that created no forfeiture. The statute as to time was directory. The action of the court was a nullity, and did not deprive the relator of his right to present his new bond; and if it were considered sufficient by the court, he was still entitled to the office.

Petition for mandamus.

This was a petition by relator setting forth his election to the office of county treasurer of Texas county, and praying for a writ of *mandamus* requiring the County Court of Texas county to accept and approve his bond as county treasurer, and to annul

State ex rel. Blenkinship v. County Court of Texas county.

an order passed by the court which declared the office of county treasurer vacant, and appointed one Ira Martin to fill the same.

For statement of the case, see, also, opinion of the court.

H. B. Johnson, Attorney-General, for relator.

The time prescribed by statute is merely directory. (*State ex rel. Attorney-General v. Churchill*, 41 Mo. 41; *State ex rel. Jackson v. Howard County Court*, *id.* 247; *State ex rel. Adamson v. Lafayette County Court*, *id.* 54.)

F. M. Geiger, and *S. G. Williams*, for respondent

WAGNER, Judge, delivered the opinion of the court.

The case is submitted on a demurrer to the return made on the alternative writ. The material averments in the petition are not denied by respondents. It seems that the action of the court in rejecting the bond was arbitrary and oppressive. No evidence was permitted to be introduced to show the solvency of the sureties; but the court, acting of their own motion, summarily rejected the same, and declared the office vacant on the same day, without giving any time to file a new bond. When relator did present an additional bond, the court refused to entertain it for the reason that an appointment had been made, and it was too late. Admitting that the first bond was insufficient, the action of the court in proceeding to declare the office vacant on the day of its rejection, and appointing another person to fill the office, was totally unwarranted. If the time originally prescribed by law for filing the bond had expired when these proceedings were had, that created no forfeiture. The statute as to time is directory. (*State v. Churchill*, 41 Mo. 41.) The acts of the court in declaring the office vacant on the day it arbitrarily rejected the bond, and its filling the office at the same time by a new appointment, were nullities, and did not deprive the relator of his right to present a new bond and have its sufficiency considered; and if it proved to be good, he was still entitled to the office. The court should proceed to act and pass judgment on the second bond offered.

A peremptory writ will be ordered. The other judges concur.

Bryson, by next friend, v. Bryson.

MARGARET L. BRYSON, BY NEXT FRIEND, Defendant in Error,
v. ISAAC N. BRYSON, Plaintiff in Error.

1. *Divorces—Legislature has no power to grant.*—The doctrine that the Legislature of this State has no power to grant divorces dissolving the matrimonial connection, has been too long and well established, by repeated adjudications, to warrant its disturbance.

Error to Sixth District Court.

On the 24th day of February, 1845, the Legislature granted a "legislative divorce" to plaintiff in error, dissolving the marriage between himself and the defendant in error. Defendant in error afterward instituted proceedings in the Circuit Court of Pike county, Missouri, to obtain alimony; and on the 10th of April, 1851, the Circuit Court rendered a decree granting her, as alimony, \$275 per annum. Plaintiff in error appealed from that decree to this court, where the decree was affirmed. (See Bryson v. Bryson, 17 Mo. 590.)

At the September term, 1867, of the Pike Circuit Court, defendant in error instituted these proceedings to obtain an increase of alimony. Plaintiff in error answered, setting up as a defense the legislative divorce granted him. That portion of the answer was demurred to, and the demurrer was sustained, and the court increased the alimony to \$472 per annum. From this decree, and the ruling of the court on the demurrer, plaintiff in error appealed to the District Court, and the case comes here by writ of error.

D. P. Dyer, for plaintiff in error.

The Legislature had the power to grant the divorce. (Bishop on Marriage and Divorce, §§ 773, 774, 775, 782, 785, 786; Starr v. Pearce, 8 Conn. 541; Townsend v. Griffen, 4 Harrington, Del., 440; West v. West, 2 Mass. 223.)

R. A. Campbell, and *Ewing & Holliday*, for defendant in error.

Bryson, by next friend, v. Bryson.

The act granting the divorce was unconstitutional. (State v. Fry, 4 Mo. 120; Bryson v. Campbell, 12 Mo. 498; Bryson v. Bryson, 17 Mo. 590.)

CURRIER, Judge, delivered the opinion of the court.

The only question presented by this record respects the constitutional authority of the Legislature to grant divorces dissolving the matrimonial connection.

Whatever the rule on this subject may have been in England and in different States of the Union, the doctrine that the Legislature of this State has no power to grant such divorces has been too long and well established, by repeated adjudications, to warrant its disturbance at the present time. (Gentry v. Fry, 4 Mo. 120; Bryson v. Campbell, 12 Mo. 498; Bryson v. Bryson, 17 Mo. 590.) The wisdom of the principle of these decisions has been vindicated by its transference, in express terms, into the organic law. (Const., art. 4, § 27.) The impolicy and bad tendency of legislative divorces is now generally recognized, and the practice is passing into disuse under the influence of distinct constitutional prohibitions. Mr. Bishop, in his work on marriage and divorce (Bishop on Marriage and Divorce, 660), states that "the subject of legislative divorces is daily becoming of less and less practical interest in the United States, in consequence of the continually increasing jurisdiction given to the courts of the several States to dissolve the matrimonial connection, and of provisions, which are rapidly working themselves into our revised constitutions, prohibitive of divorces by the Legislature."

It was judicially determined in 1835 (4 Mo. 120), three years before the present parties were married, in opinions covering eighty pages of the printed report, that the Legislature had no power to dissolve the marriage relation; and that decision was affirmed in 12 Mo. 498, where the present defendant below was a party, and again in 17 Mo. 590, where the present litigants were both parties to the suit.

These steps can not be retraced, and the decree of the court below must consequently be affirmed as of the date at which it

The State of Missouri v. Joeckel.

was rendered, subject, however, to the following order: Ordered, that the defendant below be allowed, as a credit, any payments he may have made on the original decree for the time elapsed since June, 1868. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. ANDREW JOECKEL,
Appellant.

1. *Crimes and punishments—Offense consisting of different grades—Instructions limiting verdict to one grade.*—It is the established doctrine in this State that upon the trial of a person indicted for an offense consisting of different grades, the court may, by suitable instructions, if the evidence warrants it, direct the jury that the case, as made out by the evidence, belongs to one of the specified grades, and that, if the evidence is believed, they must find their verdict accordingly.

Appeal from St. Louis Criminal Court.

Clover & McElheny, for appellant.

C. P. Johnson, circuit attorney, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The prisoner was indicted in the St. Louis Criminal Court for the crime of murder in the first degree, and at the trial was convicted of murder in the second degree. The only real error complained of is the action of the court in giving and refusing instructions. The evidence shows that the prisoner, in company with several others, on the 30th day of March, 1868, visited several saloons, and were drinking beer, in the town of Manchester; that Harrison, the person killed, did not belong to the company, but met them on one or two occasions on that day. No words of an unfriendly character passed between any of the party and the deceased on that day. Finally, at eight or nine o'clock in the evening, the party were assembled at one of the saloons in that place, and Harrison came in and stood a short time, and left by the back door. He does not seem to have

The State of Missouri v. Joeckel.

mingled with them in their carousing, nor to have had any misunderstanding with them. Immediately after he left, the prisoner went out of the other door, proceeded around the yard, where he found a spade, and hit Harrison the fatal blow, from which he died in a few hours. The act seems to have been deliberately and coolly done. The companions of the prisoner then took the dying man and carried him across the street, where he lay exposed all night, and on the following morning was found dead.

The prisoner had been heard to say, before the perpetration of the deed, that he would give the deceased what he had given him before; and, after the act was committed, he said that he had "given him *one*," and enjoined secrecy on his associates, lest the affair should come to the knowledge of his father. The circuit attorney, on the trial, declined prosecuting for murder in the first degree, but proceeded for murder in the second degree.

The court refused all the instructions asked for by the accused, and, of its own motion, gave, among others, the following: "In this case, the State, by its representative, the circuit attorney, declines to prosecute the defendant for murder in the first degree, as charged in the indictment, but proceeds against him upon the less grave charge which it embodies of murder in the second degree. To this charge alone I will direct your attention, as, in my opinion, the testimony in this case does not apply to any other. The distinction between murder in the first degree and murder in the second degree lies in the intention with which the act of killing was done. Where a homicide has been committed, and there was an intent to do the act, then, in the absence of any circumstances of excuse, justification, or extenuation, recognized by law, it is murder in the first degree. But if the party killing did not intend to kill, but assaulted and killed with malice, as this term is known to the law, then the offense is murder in the second degree. Malice, as known to the law, does not mean mere spite, ill-will, or dislike, as it is ordinarily understood, but, as applicable to this case, it means the intentional doing of a wrongful act without just cause or excuse. With these preliminary remarks, I will state to you that in order to convict the defendant of murder in the second degree, under this indictment,

you must be satisfied and believe from the evidence that Milton Harrison was killed by the means and in the manner specified in the indictment; that he came to his death by violence thus inflicted upon him by the defendant; and that such violence was so inflicted upon him by the defendant willfully—that is to say, not by accident—and with malice as above defined. If, therefore, you believe and find from the evidence that the defendant, in St. Louis county, feloniously, willfully, and with malice, killed Milton Harrison in the manner and by the means specified in the indictment, you will find him guilty of murder in the second degree; and so finding, you will assess his punishment at imprisonment in the penitentiary for a term of not less than ten years.”

The instructions state the law with clearness and precision, and point out the distinction between murder in the first and second degrees. The statute, after defining murder in the first degree, says: “All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree.” (Gen. Stat. 1865, § 2, p. 778.) But it is objected—and that is the chief ground of complaint—that the court erred in confining the consideration of the jury to the offense of murder in the second degree, and that it should have given the defendant’s instructions on the law of manslaughter, so as to have allowed them to find him guilty of some of the lesser grades of homicide.

There is no evidence whatever in the case that goes to show that his offense comes within any of the sections defining the crime of manslaughter; and it is the established doctrine in this State that upon the trial of a person indicted for an offense consisting of different grades, the court may, by suitable instructions, if the evidence warrants it, direct the jury that the case, as made out by the evidence, belongs to one of the specified grades, and that, if the evidence is believed, they must find their verdict accordingly. (State v. Shoenwald, 31 Mo. 141; State v. Starr, 38 Mo. 270.) This practice is not an invasion of the province of the jury as to questions of fact; it is simply applying the law to the facts. Where the evidence all tends to prove a certain offense, the administration of justice must not be defeated by

Ex parte Hickey, Adm'r of Holland, v. Dallmeyer.

allowing jurors, through sympathy, to convict of a less or different offense. The case at bar was unquestionably murder in the second degree; and if the jury found the facts to be that the prisoner committed the offense as charged in the indictment, the law fixed the grade.

There was no error in the action of the court in refusing the defendant's instructions. Some of them were objectionable, as being inapplicable to the case as shown by the evidence; besides, the instructions given by the court presented the law fairly and correctly, and were sufficient. The jury have found that the prisoner killed Harrison with the means and in the manner set out in the indictment. He was fairly tried and rightly convicted.

Let the judgment be affirmed. The other judges concur.

Ex parte TIMOTHY HICKEY, ADM'R OF TIMOTHY HOLLAND, Appellant, v. WM. Q. DALLMEYER, State Treasurer, Respondent.

1. *Damages—Iron Mountain railroad—Special act of March 3, 1869.*—Section 2 of the special act of March 3, 1869, authorizing compensation to persons injured on the Iron Mountain railroad, did not limit the claim to party injured personally, but his administrator would be entitled under it to receive payment of the amount after his death. Section 2 was intended to guard against a sale of the claim, and nothing more.

Petition for mandamus.

Philip Donahoe, for petitioner.

H. B. Johnson, Attorney-General, for respondent.

BLISS, Judge, delivered the opinion of the court.

The applicant presents his petition for a peremptory writ of *mandamus* commanding the treasurer of State to pay a certain warrant drawn upon him by the State auditor, in favor of said Holland, while living, for the sum of \$1900, and shows that it was appropriated to him by a special act of March 3, 1869, in compensation for injuries received upon the Iron Mountain rail-

State, to use of Heed, v. King et al.

road while owned by the State. After Mr. Holland had received the warrant, and before its payment, he died of his injuries; and the treasurer declines to pay it in consequence of the phraseology of the act, which directs payment "upon presentation thereof by the said Timothy Holland, or by his agent, with the signature of the said Holland indorsed thereon." This language is construed as limiting the claim to him personally, and denying it to his personal representatives. We can give it no such construction. The appropriation, by the first section of the act, is general. The second section only defines the mode of payment, and seems to have been intended to guard against a sale of the claim, and nothing more. The debt was due to Holland at the time of his death, and his personal representative is entitled to receive it. The attorney-general, for the treasurer, demurs to the petition, and claims that the Legislature intended this appropriation only for the personal relief of Holland during his life. If such had been the intention, it was easy to have made it appear by the act. But that intention can not be inferred from a provision of this kind.

The other judges concurring, a peremptory *mandamus* will issue.

STATE, TO THE USE OF THOMAS D. HEED, Respondent, v. HENRY C. KING *et al.*, Appellants.

1. *Sale — Delivery — Reasonable time, how determined.*—What would be a "reasonable time," under the statute (Gen. Stat. 1865, p. 440, § 10), for delivery of goods after sale must be determined by the circumstances of each case. And instructions may properly call the attention of the jury to the evidence, and, upon a proper hypothesis, may direct what the verdict shall be.
2. *Practice, Civil — Trial — Instructions should not reiterate each other.*—If an instruction is simply a reiteration of other instructions given, and embraces no new proposition applicable to the case, it need not be given. Courts should simplify their directions to the jury, and ought not to embarrass them by elaborations of the same point in different ways.
3. *Practice — Evidence, objections to — Reasons for must be assigned at the time.*—Objections to admission of testimony will not be noticed on appeal unless the reason therefor be given.

State, to use of Heed, v. King et al.

4. *Attachment bond, suit on—Delivery of goods—Declaration of vendor proper.*—In a suit on the bond of an attaching plaintiff, by the claimant of certain household furniture, which had been levied on, declarations of the vendor at the time of the sale, concerning his intention of leaving the house, are competent as bearing on the question of fraud and that of delivery.
5. *Attachment bond, action on—Pleadings—Verdict—Judgment—Exceptions to, when must be taken.*—In an action on an attachment bond, under sections 2 and 4 of act of March 3, 1855 (Sess. Acts 1855, p. 464), plaintiff's petition was drawn on the supposition that the party to whose use the bond was given, and not the State of Missouri, was plaintiff, and verdict and judgment were rendered for him accordingly. No exceptions were taken to the pleadings, verdict, or judgment, either in the lower courts or by assignment of errors. *Held*, that the defects were wholly formal, and noticed too late in this court. In such case, the judgment below is as complete a bar as though entirely formal.

Appeal from St. Louis Circuit Court.

Dryden, Lindley & Dryden, for appellants, relied on Gen. Stat. 1865, p. 44, § 10; *Clafin et al. v. Rounburg*, 42 Mo. 439; *Hamilton v. Russell*, 1 Cr. 309; Gen. Stat. 1865, ch. 150, § 15, and ch. 161, § 3; Sess. Acts 1855, p. 464.

Coonley & Madill, for respondent.

BLISS, Judge, delivered the opinion of the court.

This suit was brought upon a bond given by the defendants, as attaching creditors of one Pierce, upon property claimed by T. D. Heed under the provisions of "an act concerning the duties of sheriff and marshal, in the county of St. Louis, in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons," approved March 3, 1855 (Sess. Acts 1855, p. 464). Pierce was about to remove to the State of Louisiana, and on the 8th day of April, 1868, sold his household furniture to Heed for \$2,000, he agreeing to pay \$1,000 down, and give his note for the balance. He paid Pierce \$100 down, and took the bill of the furniture, and the next morning paid \$900, and gave his note. It was a part of the agreement that the furniture should remain in the house until it could be sold, as Heed bought it on speculation. On the afternoon of the 9th, the property was attached and the bond given.

State, to use of Heed, v. King et al.

Judgment was obtained in the Circuit Court for the value of the property, and the judgment was affirmed at general term.

The principal questions involved in the appeal arise from the instructions to the jury given and refused. The following were given by the court, on its own motion, and excepted to by the defendants: "The jury are instructed that if the said Pierce did sell the property in question with intent to hinder, delay, or defraud his creditors, said Heed could not be prejudiced thereby unless he had, at or previous to the sale, knowledge of such intent or such information as to put a man of ordinary prudence upon inquiry in regard to it." "If the jury believe from the evidence that the said Thomas D. Heed purchased the property in question, but that he did not within a reasonable time take possession thereof, regard being had to the situation of the property, then the jury will find for the defendant." "If the jury believe from the evidence that said Thomas D. Heed purchased the property in question in good faith, for a valuable consideration, with a view to take possession thereof as soon as practicable, regard being had to the situation of the property, but, before he had had an opportunity to take possession thereof, the same was levied on and taken away, then the jury will find for the plaintiff, and assess the damages at the value of the property—not, however, to exceed the sum of four thousand dollars, together with interest from May 14, 1868, at the rate of six per cent. per annum."

From an examination of the evidence, as spread out in the bill of exceptions, I am satisfied that these instructions contain a correct statement of the law as applied to it. Special objection is taken to the phrase "with a view to take possession thereof as soon as practicable, regard being had to the situation of the property, but, before he had an opportunity," etc., as not being founded upon evidence, and containing a suggestion to the jury calculated to mislead. It was clearly established and uncontradicted that the purchaser of the furniture was to have the use of the house for ten days, for the purpose of selling it at auction or otherwise; that the seller was expecting to leave in a day or two, giving him sole possession of the house and furniture; and that

State, to use of Heed, v. King et al.

the very day the bargain was consummated, by the payment of the \$1,000, the goods were attached. This testimony fully warranted the instruction complained of. There is nothing technical or unnatural in the provision of the statute requiring sales of personal property to be "accompanied by delivery in a reasonable time, regard being had to the situation of the property." Like all other legal requirements, it is to be interpreted by the rules of common sense. What would be a reasonable time under some circumstances would not be under others. Regard must necessarily be "had to the situation of the property," whether required in the statute or not. If one purchased a stack of hay in a field, he could not be required to remove it at once. It must be delivered to him; but if left in the field for a short time, it would not furnish such a presumption of non-delivery as if the vendor were permitted to retain possession of a horse or a watch. So, if a tenant was about to leave a dwelling which was rented to another, who was to take possession on his leaving, it would be natural for the incoming tenant, if he desired to purchase articles peculiarly fitted for the house, to do so before it was vacated, and stipulate that they were to be left by the outgoing tenant. In deciding what would be a "reasonable time" for delivery, regard would necessarily be had to the "situation of the property." The instruction complained of calls the attention of the jury to the evidence to which they had just listened, and, upon a proper hypothesis, directs what the verdict should be.

The defendants asked the court to give several instructions, elaborately constructed upon their view of the evidence; the first of which was given, and the rest refused. The one given it is not necessary to consider. We have examined the rest, and find them either defective or simply embracing the law as already declared. If an instruction is simply a reiteration, and embraces no new proposition applicable to the case, the party has no right to demand it. The court should simplify its directions to the jury, and ought not to embarrass them by elaborations of the same point in different ways.

Most of these instructions make the statutory requirement of delivery more stringent than the statute itself. The revision of

State, to use of Heed, v. King et al.

1865 materially modifies the old law, but a "reasonable time" for delivery is still left, "regard being had to the situation of the property." We have no right to add to the severity of its requirement. The instructions are long, and it is unnecessary to recite them that our views may be understood. Their errors are subtle, and consist in omissions rather than statements. To have instructed the jury in the various forms requested in relation to the necessity of immediate delivery, the effect of leaving the goods in possession of Mr. Pierce and family for an indefinite time, without also calling their attention to the circumstances under which they were left—to the necessity of "having regard to the situation of the property"—would have been erroneous; for what would be a "reasonable time" in one case might be altogether unreasonable in another.

In describing the purchase and circumstances attending it, the plaintiff, in testifying, stated that "Mr. Pierce told me that he expected to leave daily, and was very anxious to get away;" to the admission of which testimony the defendants excepted, without stating the grounds of their objection. Though we ought not to take notice of such objections unless their reason be given (*Rosenheim v. Am. Ins. Co.*, 33 Mo. 230), yet it may have been sufficiently obvious in this case. This statement of Mr. Pierce to the purchaser was so clearly a part of the transaction—so material, as bearing upon its good faith on the part of the plaintiff, as explaining not only the occasion of the purchase, but also as bearing upon the question of reasonable time—that it would doubtless have been received, had the objection been ever so formal. The testimony bears upon both the question of actual fraud and the question of delivery. Did Heed buy the property for the use of the vendor, to enable him to hold it as against his creditors? If so, it was fraudulent, without regard to the time of delivery, though the time of delivery would bear upon the question of fraud. Did the vendor agree to leave the house forthwith, as soon as he could get away? for that is the natural import of "expecting to leave daily." If such was the agreement, and the purchaser should wait a day for him to leave before removing the goods, reasonable time would not have elapsed.

State, to use of Heed, v. King et al.

And the declarations of Pierce in regard to the matter, made at the time of the purchase, are not only competent, but almost the only evidence the nature of the question admits of. Objections in argument are made to the frame of the petition and the form of the judgment. The suit is instituted upon a bond payable to the State of Missouri, as provided in section 2 of the act first referred to. By section 4 of the same act the claimant is authorized to bring a civil action upon the bond, "in the name of the State, to his own use," or he may proceed by motion. In instituting this suit he has entitled his petition as follows: "The State of Missouri, to the use of Thomas D. Heed, plaintiff, v. Henry C. King," etc.; and in commencing his statement says: "The plaintiff says that on and previous to the 9th day of April, 1868, he was the owner," etc.; and the whole body of the petition is drawn upon the supposition that Heed, instead of the obligor of the bond, is the plaintiff in the action. The petition states the plaintiff's ownership of the property; its seizure upon attachment against Pierce; that "the same plaintiff made his claim for the same, stating," etc.; the execution of the bond, with a penalty of \$5,000, and its delivery to the officer; and sets out its conditions in detail. It afterward avers that the property was sold to the damage of the plaintiff of \$4,000, and charges that the defendants have not paid him the damage so suffered, and asks judgment for \$4,000. The defendants seem not to notice this unusual way of declaring on a bond, but answer the allegations of the petition in detail, admitting or denying them all. Heed replies in the same style. The jury find for the plaintiff, and assess his damages at the sum of \$2,075, for which the court rendered judgment. A motion for a new trial is overruled at special term, and a motion in arrest at general term; but in neither is special objection made to these informalities of the pleadings, verdict, and judgment, nor are they noticed in the assignment of errors.

The defects are wholly matters of form, and are noticed too late. No one is injured by them. Heed is the only person who has any interest in the bond; and the irregular recognition of him as the plaintiff in the proceedings, the verdict for the plaintiff and the judgment for his damages, instead of a judgment for

Beard et al. v. Parks.

the penalty, in favor of the State, to his use, with execution for damages and costs, give the party in interest no more than his due, and take from the defendants no more than they were obligated to pay. This judgment is also as complete a bar to any further proceeding as though entirely formal. Upon the principles recognized by this and all other appellate courts, we must decline to interfere at this late day. (See Tidd's Practice, 919, note *a*, and cases cited.)

The judgment is affirmed. The other judges concur.

JAMES P. BEARD *et al.*, Plaintiffs in Error, *v.* WILLIAM PARKS,
Defendant in Error.

1. *Practice, Civil — Action — Account — Justice's court — Statement of account not filed — Exceptions should be taken, when.*—In a suit upon an account, commenced before a justice of the peace and appealed to the Circuit Court, although the record failed to show that "an account or statement of the cause of action" was filed either before the justice or the Circuit Court, yet if no exceptions to the omission or to the rulings of the court, grounded on the defect, were taken in the Circuit Court, the case is not open to review in the appellate court.

Error to Second District Court.

John L. Thomas, for plaintiffs in error.

Abner Green, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This suit originated in a justice's court, and is based on an account amounting to \$23.60. An appeal was taken from the justice to the Circuit Court, where the case was tried *de novo*, and judgment rendered for the plaintiffs. The case was then taken to the Second District Court, where the judgment of the Circuit Court was reversed, on the ground that the record failed to show that "an account or statement of the cause of action" was filed either before the justice or in the Circuit Court.

The justice's transcript shows that the suit was upon an account for \$23.60. Null, one of the plaintiffs, testified that the plaintiffs "did the work charged in the account sued on;"

State ex rel. State Savings Association v. Draper.

but the account itself does not appear in the record—the result, probably, of an error of the clerk. However this may be, no exceptions were taken in the Circuit Court to the absence of the account, or to any ruling of the court, grounded upon the supposed defect, and the matter, therefore, was not open to review in the appellate court. There is nothing to indicate any error in this respect on the part of the Circuit Court. (37 Mo. 578; 38 Mo. 357.)

Defendant's first instruction was erroneous, in that it made the case turn upon the isolated fact of the defendant's knowledge of the actual existence of the disputed partnership relation of the plaintiffs. If the plaintiffs were partners, and, as such, did the work for the defendant at his request, the defendant's want of knowledge of the existence of the partnership would not of itself defeat the action. The second instruction is defective, in that it assumes the right, on the part of Beard, without the consent of his co-partner, to apply the partnership effects to liquidate his private indebtedness.

It is not perceived that the defendant is harmed by the instruction given for the plaintiff. The counsel of the defendant, in his brief, impliedly admits the facts on which the instruction was predicated, and insists that Beard's indebtedness to the defendant was not a matter of set-off, but was in the nature of a payment by the defendant to Beard & Null, the plaintiffs.

The judgment of the District Court is reversed, and the judgment of the Circuit Court affirmed. The other judges concur.

STATE *ex rel.* STATE SAVINGS ASSOCIATION, Relator, *v.*
DANIEL M. DRAPER, State Auditor, Respondent.

1. *State Savings Association—Act for payment of, vouchers unnecessary.*—The act of March 4, 1869, appropriating a specified sum to pay the amount "due the State Savings Association, of St. Louis, for moneys advanced by said Association to Governor Gamble, September 2, 1862," is conclusive evidence of the indebtedness and its amount; and, under the law, no voucher or other evidence is necessary.

State ex rel. State Savings Association v. Draper.

Petition for mandamus.

J. N. Litton, for relator.

H. B. Johnson, Attorney-General, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a petition for a writ of *mandamus* against the State auditor. It shows that by an act of the Legislature passed March 4, 1869, the General Assembly appropriated the sum of "\$9,107, with interest at the rate of six per centum," to pay the amount "due the State Savings Association, of St. Louis, for moneys advanced by said association to Governor Gamble, September 2, 1862;" that the relator is the party interested in the said appropriation, and the sole owner of the indebtedness therein mentioned; that he has repeatedly requested the defendant to draw his official warrant in the relator's favor, in accordance with the act of appropriation, and that the defendant neglects and refuses to do so. The petition is demurred to, principally on the ground that it does not show that the relator "ever exhibited to the defendant any voucher or evidence upon which the money appropriated by said act could be paid." The exhibition of such evidence would have been appropriate and natural; but the law did not make it necessary, or intimate that such evidence was in existence. The Legislature audited and settled the claim, and fixed the exact sum to be paid. The auditor has no discretion in the premises. The act is conclusive evidence of the indebtedness and its amount. The auditor has nothing to do with its propriety or justice. It is his duty, on presentation of the demand by the proper party, to compute the interest and draw his warrant for the aggregate sum, in the usual way, taking an appropriate voucher on delivering the warrant, showing that it was drawn and delivered in satisfaction of the indebtedness specified in the act of appropriation.

The peremptory writ is ordered. The other judges concur.

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JULY TERM, 1869, AT JEFFERSON CITY.

ANNA CAMPBELL *et al.*, Respondents, *v.* GABRIEL JOHNSON,
Appellant.

1. *Deeds—Description by quantity, by metes and bounds.*—A call for quantity in a deed must yield to a more definite description by metes and bounds.
2. *Deeds—Description by quantity, by metes and bounds—Latter should prevail.*—Without an express averment or covenant as to quantity of land in a deed, it will always be regarded as a part of the description merely; and will be rejected if inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but ordinarily does not control, the description of the granted premises.
3. *Deeds—Interpretation of—Intention of maker should be sought for—Inaccuracy—Patent ambiguity, deed void for.*—In the interpretation of deeds the intention should be sought after and carried out, and the identity of the land ascertained, by a reasonable construction of the language used. If the land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void. But to have this effect, and render the deed void for uncertain description, the ambiguity must be patent, and appear on the face of the instrument.
4. *Ejectment—Description—Deed—Patent ambiguity, how cured.*—Suit in ejectment was brought for “the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen,” of Randolph county, embracing an area of forty acres. The only designation in the deed on which

Campbell et al. v. Johnson.

the suit was founded which would include this tract was "the southwest quarter of section eleven." A quarter-section contained four forty-acre tracts. *Held*, that there being nothing in the deed to show to which forty it applied, the ambiguity in the description was patent, and could not be removed by extrinsic evidence. The title to the tract should be perfected by an action to reform the deed.

5. *Ejectment, suit in—Receipt of purchase money—Estoppel.*—Where A. alleged that B. had not conveyed to him a certain tract of land, and in pursuance of such allegation commenced a suit for the purchase money, as for a failure of consideration; and B., relying upon the assertion of A., paid him back the money, and took a receipt therefor: *held*, that A. thereby caused B. to change his condition to his own detriment, and would be estopped from afterward suing B. in ejectment for the land.

Appeal from Fourth District Court.

Hall & Reed, for appellant.

The description in the deed is too vague to convey the forty acres in controversy. (1 Greenl. Ev. § 301, and authorities cited.) Plaintiffs having recovered the purchase money for said forty acres from defendant on the ground that they had no conveyance therefor, are estopped from setting up a title to the same against defendant. (1 Greenl. Ev. §§ 207-8; *Taylor et al. v. Zepp*, 14 Mo. 482; *Chouteau et al. v. Goddin et al.*, 39 Mo. 250, and authorities cite

H. M. & J. B. Porter, and *John R. Christian*, for respondents.

I. A call in a deed for boundary will prevail over a call for quantity. (*Whittelsey v. Kellogg*, 28 Mo. 404; *Orrick v. Bower*, 29 Mo. 210.)

II. The writing signed by Anna Campbell is not such an admission as will amount to an estoppel in this suit. If it contains any admission, it was made long after the money was paid, was never acted upon, and did not in any manner affect the parties. (*Merriweather v. Lewis*, 9 B. Monr. 179; *McAfferty et al. v. Conover*, 7 Ohio St. 105; *Bocock and Wife et al. v. Pavay et al.*, 8 Ohio St. 281; 1 Greenl. Ev. § 207.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, brought in the Randolph County Circuit Court, for the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen, lying in said county. The defendant answered, denying plaintiff's right to the land, and for a defense stated that on a given day he sold to plaintiff the land mentioned in the petition, and made, or attempted to make, a conveyance for the same, and supposed that he had properly conveyed it to plaintiff; that in a short time thereafter, being on the eve of leaving the State, the plaintiff sued him by attachment for the price of the land in controversy, alleging that the defendant had not conveyed the land in his said deed; that thereupon he paid plaintiff the amount claimed in the attachment suit, and kept and retained possession of the land. The deed and the record of the attachment proceedings, together with the receipt showing payment by the defendant, were all given in evidence. The Circuit Court gave judgment for the plaintiff, which was affirmed on appeal in the District Court, and the case is now brought up for revision.

It is contended by the counsel for the defendant that the judgment should be reversed for two reasons: first, because the deed by which the plaintiff sought to maintain title to the premises was void for uncertainty; secondly, on the ground that the plaintiff, having disclaimed the title on account of the alleged defective conveyance, and brought suit for the purchase money and recovered the same, was estopped from setting up any further claim to the land. The deed purports to convey the defendant's farm, consisting of three hundred and thirty-two acres. The land is divided and described by legal subdivisions, according to the United States surveys, and includes seven distinct tracts. The only designation in the deed which would include and convey the forty-acre tract sued for is as follows: "the southwest quarter of section eleven, containing forty acres." This description, by rejecting the quantity of acres, would pass the title to the whole quarter-section. That such was not the intent of the maker of the deed is demonstrable, from the fact that one of the other

Campbell et al. v. Johnson.

tracts conveyed is the southwest fourth of the same quarter-section. The other tracts contained in the deed are all set out according to their legal subdivisions, with the number of acres they are supposed respectively to contain, attached. A quarter-section, by the regular survey, includes one hundred and sixty acres; and to give effect to the deed according to its literal import, the plaintiff would have eighty acres more than she contracted for, and by rejecting the irregular description she fails to obtain the requisite amount by forty acres. But it is a well-known rule of construction that a call for quantity in a deed must yield to a more definite description by metes and bounds. The quantity of land conveyed is generally mentioned in the deed; but without an express averment or covenant as to quantity, it will always be regarded as a part of the description merely, and it will be rejected if it be inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but ordinarily does not control, the description of the granted premises. (3 Washb. Real Prop., 3d ed., 348.) In this, as in other cases, the intention should be sought after and carried out, and the identity of the land ascertained, by a reasonable construction of the language used. But if the land granted be so inaccurately described as to render its identity wholly uncertain, then it is admitted the grant is void. (Boardman v. Reed, 6 Pet. 328.) To have this effect, and render the deed void for uncertain description, the ambiguity must be patent, and appear on the face of the instrument; the uncertainty must not appear by matter outside. (Hardy v. Matthews, 38 Mo. 121, and cases cited.) It is not insisted that the plaintiff bought more than the forty-acre tract sued for in this action, and the only description in the deed by which the title could be conveyed is the southwest quarter of the whole section. Now the quarter-section contains four forty-acre tracts, and here is nothing to show to which forty the deed applies. The ambiguity is patent, and can not be removed by the application of extrinsic evidence. The question here does not arise as to the quantity of acres passing by the grant, but as to what particular tract was conveyed. There is really no dispute as to the number of acres; the whole

Campbell et al. v. Johnson.

contention concerns the identity. Had the plaintiff desired to perfect her title and retain the land, she should have commenced proceedings and had her deed reformed.

As to the second point arising out of the estoppel, the law is well established in this court, and the ruling has been uniform. (See *Taylor v. Zepp*, 14 Mo. 482; *Newman v. Hood*, 37 Mo. 207; *Chouteau v. Goddin*, 39 Mo. 229.) In discussing the subject of estoppel, Lord Denman, in *Peckard v. Sears* (6 Ad. & El. 475), says that the act of the party which induced the opposite side to act must be "willful." He remarks: "Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In commenting on this definition of an estoppel, in a subsequent case (*Freeman v. Cook*, 2 Exch. 654), Parke, B., said that the rule laid down in *Peckard v. Sears* was "to be considered as established, but that the term 'willfully' must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth." In the present case the plaintiff alleged that the defendant had not conveyed to her the land which is here in issue. In pursuance of that allegation, she commenced a suit for the purchase money, as for a failure of consideration. The defendant, relying on her assertions and representations, paid her back the money, and took a receipt therefor. He changed his condition—he acted at her instance—and there would be no justice in allowing her now to aver anything contrary to her solemn action, and to his detriment. To hold otherwise would be sanctioning wrong. It would be to permit a party, at his convenience and will, to repudiate a contract, and compel the other party to deliver up

Haywood et al. v. Russell et al.

and surrender its benefits ; and then, when a change should happen to take place, and it might be advantageous, to coerce a restoration of the original contract, and again force the second party to comply with the demands of the other. There would be no mutuality in such a proceeding, and, in effect, the one party would be the helpless victim in the hands of the other, forced to submit to his pleasure and caprice.

But it has been argued here that there is nothing to show that the attachment suit and the money refunded was for this specific piece of land. This position is not borne out by the record. It is abundantly clear that the land for which this action was brought was the only tract about which there was ever any controversy. It was treated so by both parties ; and the plaintiff, when she made a demand for it, made a solemn admission as to its identity. She has got a full, perfect, and complete deed of conveyance for all the balance of the land sold ; and it is shown by the record that no other land was in dispute between the parties.

I think the judgment should be reversed. Judge Bliss concurs. Judge Currier absent.

HAYWOOD, CARR *et al.*, Respondents, *v.* A. H. RUSSELL *et al.*,
Appellants.

1. *Attachment—Non-residence—Notice, under act of 1855, should state the amount claimed.*—Where attachment was levied on certain land of defendant, on the ground of his non-residence, notice of the suit stating that the proceedings were “founded upon two promissory notes for the sum of \$386.94,” embraced a sufficient statement of the nature of the demand, under section 23, chapter 12, R. C. 1855 ; but is defective, under that section, in not stating whether the sum named in the notice was the amount claimed by plaintiffs ; and execution issued on attachment based on such notice may be quashed.
2. *Attachment—Non-residence—Notice, last publication of, how long before next term.*—Under the provision of 1855, concerning notice of attachment (R. C. 1855, ch. 12, § 23), it is not necessary that the commencement of the publication should be eight weeks before the next term of court, nor that the four weeks should end four weeks before the next term. It is sufficient if the publication be four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term.

Appeal from Third District Court.

Phillips & Vest, with *McLean & Shick*, for appellants.

T. A. Sherwood, for respondents.

BLISS, Judge, delivered the opinion of the court.

Plaintiffs attached certain real estate of defendant Russell, by process from the Circuit Court of Benton county, obtained judgment by default, issued special *fi. fa.*, and sold the property. The ground of the attachment was non-residence, and no personal service was had. After judgment, defendant appeared and moved to set it aside for irregularity in the notice and other reasons.

The statute of 1855, under which these proceedings were instituted, required that the notice should state the "nature and amount of the plaintiff's demand." The notice in question states that the proceedings were "founded on two promissory notes for the sum of \$386.94." Is this a statement of the nature and amount of the demand?

A very liberal interpretation has been given to the statute, so far as it requires a statement of the nature of the demand. In *Sloan v. Forse*, 11 Mo. 126, it was held to be a sufficient statement if the action was described as "an action of *assumpsit*." Regarding that case as authority, surely a description of the claim as "founded on two promissory notes" may be regarded as giving with sufficient certainty the nature of the demand.

With regard to the amount of the demand there is more uncertainty. The original amount of the notes was probably \$386.94, but what is due upon them nowhere appears; nor does the notice give any data from which the amount can be computed. Defendants may be owing ten, or a hundred, or a thousand dollars, for anything that appears in the notice, and a default was actually taken for \$516. The object of the notice is to advise the defendant and all others interested of the general character of the claim, and especially of the amount claimed,

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

that they may decide whether to appear and defend, or let the property go to pay the debt. This notice is wholly uncertain upon a material point, and though the proceedings may not be void, they certainly can be reached in a direct proceeding like the present.

The objection to the time of publication is not well taken. The statute requires that notice should be published for four weeks, and that the last insertion should be at least four weeks before the commencement of the term. If the first publication is for one week, surely the other three are for one week each, and it is only necessary that "the last insertion"—not the last week—should be four weeks before the term. The notice objected to was published in a weekly paper, in four consecutive numbers, which makes four weeks. The objection assumes that the commencement of the publication should be eight weeks before the term, which is not required, nor is it required that the four weeks should end four weeks before the term. It is sufficient if it be for four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term.

There are other matters in the record, not brought directly before us, upon which we give no opinion. For the irregularity of the notice in not specifying the amount of the demand, or giving any data from which the amount could be computed, we think the Circuit Court should have set aside the judgment.

The judgment of the District Court affirming that of the Circuit Court is reversed, and the judgment of the Circuit Court is reversed and the cause remanded for further proceedings. The other judges concur.

STATE, TO USE OF HAMPTON B. WATTS *et al.*, BY THEIR GUARDIAN, HORACE KINGSBURY, Appellant, v. WILLIAM C. BOON *et al.*, Respondents.

1. *Administrators—Joint bonds of—Liability of sureties on for acts of survivor.*—A. and B. were appointed administrators of a certain estate, and gave bond as such. Subsequently an act of the Legislature, mentioning them by

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

name and style of office, empowered them to sell the estate and put the purchase money out at interest for the benefit of the heirs. It also required them to give new bond, with securities, to insure the performance of the trusts vested by the act. The additional bond was given, and afterward, A. having become disqualified, B., by a further act of the Legislature, was clothed with full powers to carry out the trusts, but no new bond was required. B. proceeded to sell the estate, but failed to account for the proceeds, and suit was brought against the securities on the bond called for by the original act. *Held*, that the word "administrator," as used therein, simply designated their persons; and that the powers conferred by the act were given to them *nomi-natim*, as individuals, and not in any representative capacity. They were donees of a naked power, unconnected with their duties as administrators, and the securities on their bond could not be held responsible for the wrongful acts of B.

2. *Sureties for several persons presumed to be joint — Not liable for acts of survivor.* — If a person engage as a surety to several individuals, the engagement must be understood to be to all of them collectively and jointly; and if any of them die or cease to act, it will not be available in respect to transactions afterward by the survivors or the persons continuing to act.

Appeal from Fourth District Court.

W. B. Napton, for appellant.

I. The act of 1857 was not a naked power to two individuals, disconnected with Watts' estate, but was to the two administrators of the estate, and simply extends the power already possessed by them under the general law; and the general law of administrators, which gives the survivor power to do all the acts intrusted to both, was a part of the act of 1857.

II. As to the doctrine of *descriptio personæ*, it is utterly inapplicable; the principal is substituted for the incident, the principal in this case being the administrators, and the *descriptio personæ* being their names.

III. But if Mrs. Watts was selected without reference to her position as administratrix, and invested with a naked power, as the courts have termed it, her letters were not revoked by marriage, for there is nothing in the law to hinder a married woman from executing a naked power; and it is only by virtue of the administration law that her power ceased when she married. (Sugd. on Powers, 141-4.) And why was no new bond required on her marriage if that act destroyed her capacity to sell and convey? Simply because the law recognized the right

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

of her survivor to proceed and act as though she was still acting, and the sufficiency of this bond rendered another unnecessary under the decisions of our court. (Dobyns v. McGovern, 15 Mo. 665.) The securities were responsible, after one of the administrators had died, for devastavits committed by the survivor.

IV. The doctrine "*descriptio personæ*," as applied, invoked by the other side, applies to personal and not real estate.

John B. Clark & Son, for appellant.

Wash. Adams, with whom were *Prewitt & Hall*, for respondents.

I. The powers conferred on Mrs. Watts and W. C. Boon to sell the lands of Watts, deceased, was a statutory power, and must be taken strictly; and, being a joint power, could not be executed, under the original act, by one alone. The defective execution of such a power can not be aided in chancery, because the heirs whose rights are to be affected had nothing at all to do with the creation of the power, and, *nolens volens*, if properly executed, their title would pass. (Bright v. Boyd, 1 Sto. 486; 1 Sto. Eq. § 177; Moreau v. Detchemendy, 18 Mo. 530; Speck v. Wohlien, 22 Mo. 310; Moreau v. Branham, 27 Mo. 350; Fowler v. St. Joseph, 37 Mo. 237-8; Boswell's case, per Hutton, Roll. Abr. 379; Cowper, 267; 2 Burr. 1146; 2 Freem. 244; Downing v. Boggs, 21 Wend. 178.)

II. This power is a mere naked power—one not coupled with any interest whatever. (Hunt v. Rousmanier, 8 Wheat. 174, 271; 1 Am. Lead. Cas. 576; 3 Comst. 400; 5 N. Y., 1 Seld., 144; Thatcher v. Powell, 6 Wheat. 119; 1 Hill. 141; 7 Hill. 433.)

III. This was not a case of joint trustees, where, on the death, etc., of one, the power would survive. (1 Coke, 738; Stewart v. Pettus, 10 Mo. 756.)

IV. The power to sell was not given to them in their representative capacities as administrator and administratrix of Watts, deceased. Those terms were merely a *descriptio personarum*.

V. The statutory power was no enlargement of their ordinary

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

powers as administrators, but was a new power in itself, created by statute for the benefit of the heirs alone.

VI. The bond in suit was not given to perform duties as administrators, but to account for the moneys coming to their hands by any exercise of the power under the original act. These parties are merely securities on this bond, and their liability can not be extended beyond its obligations. They did not undertake to be liable for Boon's separate acts of sale. (See *Nolley et al. v. Callaway County Court*, 11 Mo. 463.)

WAGNER, Judge, delivered the opinion of the court.

It appears from the record that Evalina Watts was administratrix, and William C. Boon was administrator, of the estate of Benjamin Watts, deceased, in Howard county, in this State, and that as such they gave bond, according to law, providing for their faithful administration. Subsequently an act was passed by the Legislature, approved February 9, 1857 (Sess. Acts 1857, p. 190), authorizing the said Evalina Watts and William C. Boon to sell all the real estate belonging to the deceased Watts. The act is entitled "an act for the benefit of the heirs of Benjamin Watts, deceased." The first section declares that "Evalina Watts, administratrix, and William C. Boon, administrator, of the estate of Benjamin Watts, deceased, of Howard county, are hereby authorized and empowered to sell and convey all the real estate belonging to said Benjamin Watts at the time of his death, lying in the said county of Howard." Section 2 requires that before sale the real estate shall be appraised by three disinterested householders of the county, to be appointed by the County Court; and provides for securing the purchase money if the same is sold on credit, and prohibits the sale being made at less than the appraised value. The third section delegates to the administrators power to divide the property and sell in lots, at their discretion. By section 4, the administratrix and administrator are required to make a full report of their proceedings, under oath, to the County Court; and, if the court approve their proceedings, they are then directed to make to the purchaser a deed, upon full payment of the purchase money,

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

conveying to the purchaser all the right, title, claim, and interest held, or which might be held, at the time of such sale, by the heirs of Watts in and to the real estate. By section 5, it is provided that, after paying all reasonable costs and expenses attending the appraisement and sale of the real estate, the administratrix and administrator shall cause the amount of the money to be loaned at interest, with good security, for the benefit of the heirs, until such time as the County Court shall order a distribution among the heirs. The sixth section provides that the County Court shall require the administratrix and administrator to give bond and security, to be approved by the court, before making any sale, sufficient to secure to the heirs the full amount for which the real estate may be sold, together with interest thereon; and authorizes the County Court to make all necessary orders to carry the act into effect, and to secure the faithful and proper application and distribution of the proceeds of the sales. Under this act, Mrs. Watts and W. C. Boon gave an additional bond, aside from their regular bond as administrators of the estate of Watts, deceased, with the defendants as their securities. This bond recited the act of the Legislature, and covenanted that the principals should faithfully comply with its terms and requirements. After selling a small portion of the real estate, Mrs. Watts married, which caused a revocation of her letters of administration on the estate of her late husband, Benjamin Watts, deceased. After the marriage of Mrs. Watts, the Legislature passed an amendatory act, which was approved January 28, 1859. This act consisted of a single section, and was as follows: "William C. Boon, administrator of the estate of B. Watts, deceased, is hereby authorized and empowered to make all sales and conveyances of the real estate of B. Watts, deceased, under and by virtue of the provisions of the act to which this is amendatory, as fully as the said William C. Boon as administrator, and Evalina Watts as administratrix, could have done under said act before the letters of administration of the said E. Watts were revoked by her marriage; and all sales of real estate made by W. C. Boon, as administrator, since the marriage of said E. Watts, in accordance with the act aforesaid, and approved by the

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

County Court of Howard county, shall be as valid and binding as if made by the said Boon and E. Watts before the marriage of said Evalina, by which her letters of administration were revoked." This amendatory act empowered Boon to sell alone, according to the provisions of the previous enactment, but did not require that he should give any new or additional bond; and none was given. Boon, under the authority of the last-mentioned act, sold a large amount of the real estate belonging to the minor children of B. Watts, but failed to account for the proceeds; and this suit was brought on the bond given by Mrs. E. Watts, Wm. C. Boon, and their securities, in accordance with the provisions of the original act. The question is whether the sureties in the bond can be held liable for the sole and separate acts of Boon, after Mrs. E. Watts ceased to act or participate in the matters connected with the sales.

The Circuit Court held that they were not responsible, and this ruling was approved in the District Court. The case must rest upon the construction placed upon the act of 1857. If the act be so construed as to confer upon the administrators of B. Watts, deceased, the power to sell the real estate in their official capacity as administrators, then the liability of the sureties is unquestioned. If, however, it conferred upon them a mere naked statutory power, giving them power to sell simply as individuals, it amounted to a personal trust, and the act of one would not hold the securities. By the statute law of this State, if there be more than one executor or administrator of an estate, and the letters of part of them be revoked or surrendered, or a part die, those who remain shall discharge all the duties required by law respecting the estate. And where the sole administration devolves on one administrator, in consequence of the death or other disability of a co-administrator, the law contemplated that state of things, and the obligation of the bond will not be impaired, but the securities will be held liable. (*Dobyns v. McGovern*, 15 Mo. 662.)

But, as a general proposition, where a statute gives a power to several persons to do anything requiring discretion or an exercise of judgment, all must meet and confer. (*Wood v. Phelps*

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

County, 28 Mo. 119.) Numerous questions have arisen, and some of them of much difficulty, in respect to the execution of powers where two or more persons are named as donees. Ordinarily, in such a case, all the donees must join in the execution of the power. And this is always true unless the contrary is expressed. (2 Washb. Real Prop. 614; 4 Greenl. Cruise's Dig. 211 n.; Co. Lit. 113, Hargrave's n. 146; Sto. Eq. Juris. § 1061; Franklin v. Osgood, 14 Johns. 553.)

In a deed where there was a power of revocation to be exercised by two persons, one of them died without exercising it; and it was held that the remaining one could not act for himself, and that the power of revocation was at an end. (Montefiore v. Browne, 7 H. L. Cas. 241.) However, where the power is to several persons having a trust capacity or an office, in its nature like that of the executors of a will—susceptible of survivorship—and any of them die, the power will survive, unless it is given to them *nominatim*, as to the individuals by name. In this latter case the power would not survive unless it was coupled with an interest in the donees of the power. (Co. Lit. 113 a., Hargrave's n. 146; Sto. Eq. Juris. § 1062; Tainter v. Clark, 13 Met. 220; Peter v. Beverley, 10 Pet. 564; 1 Sugd. Pow. 144-6.)

We must determine whether the power to sell the real estate of B. Watts, deceased, was given by the Legislature to E. Watts and Boon in their administrative capacity, or whether they were donees of a naked power, unconnected with their duties as administrators. The first section of the act names them as administratrix and administrator, and that is really the only thing that has the semblance of connecting them officially with the new powers delegated. They had already administered on the estate in the regular line of administration. The new and extraordinary powers granted by the legislative enactment were not necessary to perform any duty touching their powers as administrators. The law made ample provision for the sale of land, for the purpose of paying demands against the estate, and for the final adjustment of their accounts. But the act does not purport to invest them with power to sell for the benefit of the estate, or for anything touching the affairs of the estate, but solely for the

State, to use of Watts et al., by their guardian, Kingsbury, v. Boon et al.

heirs. It proceeds plainly upon the hypothesis that the debts were either paid, or that there were sufficient assets to satisfy them. It is entitled an act for the benefit of the heirs, and every section shows that the land, the sale, and the proceeds exclusively concern them, and have nothing in common with any interest in the estate or with anything in reference to its administration. The fact that after E. Watts and W. C. Boon were named as the persons who should be empowered to make the sales, the words "administrator" and "administratrix" were affixed does not in the least alter or vary the plain meaning of the act. The words simply designate the persons; and it may have been considered that Mrs. Watts, being the natural guardian of the heirs, and she and Boon being the administrators of the estate, and understanding thoroughly its condition and the value of the property—and, moreover, feeling a personal interest in the welfare of the minor children—were the most fit and appropriate agents to be intrusted with the important power. It is very clear from the whole context of the original act that the power was given to them *nominatim*, as individuals, and not in any representative or official capacity.

It will now be necessary to consider the effect of the amendatory act. The act assumes that Mrs. E. was no longer capable of acting in conjunction with Boon in executing the power, because her letters of administration were revoked in consequence of her marriage; and proceeds to confer upon Boon the sole power, but does not require him to give any new or additional bond. The idea in the mind of the draftsman of this act was, unquestionably, that in the execution of the power E. Watts and Boon acted in their administrative capacity, and that the power attached to their office, and the marriage of E. Watts, disqualified and disabled her from further acting. But if this were so, the act would have been superfluous and unnecessary, as the power would have survived to Boon by operation of law. But we have seen that this was a mistaken view of the law, and that the parties, in executing their trust, were the donees of a mere naked statutory power. In the capacity in which she acted in and about the sale of the realty, the marriage of Mrs. Watts was no bar to her continued

State, to use of Watts et al., by their guardian; Kingsbury, v. Boon et al.

exercise of the power committed to her in conjunction with Boon. A married woman may be an agent or execute a naked power. The case, then, stands in this attitude: A joint statutory power is given to two persons to perform certain acts; and to guarantee the faithful performance and execution of the power, security is demanded and given. One of the donees of the power ceases to act, and the other, in accordance with new authority, proceeds to execute the power by himself, but fails to faithfully discharge his duties; and waste ensues, by which the beneficiaries are damaged. Can the securities on the bond given for the joint acts of both the donees be held responsible for the wrongful acts of one? The answer to this question must certainly be in the negative.

The liability of the surety can not be extended beyond the plain terms of his contract. He is bound by the conditions of his obligation, and no further. His undertaking will extend to whatever is comprehended within the scope and limits of his engagement, but to nothing more. If a person engage as surety to several individuals, the engagement must be understood to be to all of them collectively and jointly; and if any of them die or cease to act, it will not be available in respect to transactions afterward by the survivors or the persons acting. (*Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Weston v. Barton*, 4 Taun. 673.) The sureties in the present case may have been very willing to be bound for Mrs. E. Watts and Boon jointly, and utterly averse to assuming any liability for Boon separately. And when the attempt is made to make them responsible for the sole acts of Boon, they have a right to stand upon the terms of their contract, and say that they entered into no such agreement.

My conclusion, from the whole case, is that the sureties are not liable; that the judgment of the court below was right, and ought to be affirmed. The other judges concur.

 Allen v. Ranson et al.

HORACE ALLEN, Plaintiff in Error, v. J. C. RANSON *et al.*,
 Defendants in Error.

1. *Ejectment—Suit may be brought by an insane person in his own name.*—An ejectment suit in this State may proceed in the name of plaintiff, without the intervention of a guardian, although it appear that he is insane.
2. *Ejectment—Mortgagor—Life interest of, no bar to suit.*—Where suit in ejectment is brought against a mortgagor who has possession and a life estate in the property, he can not retain his possession by showing that, when his curtesy ceases, the heirs of his deceased wife may be entitled to it.
3. *Ejectment—Party in possession—Heirs need not be made party.*—In a suit by ejectment against a party who has a possessory title and life interest in the property, it is improper to make his heirs parties defendant.
4. *Practice, Civil—Trial—Amendments, when allowed, during.*—If facts are developed upon a trial which would enable defendant to impeach the transaction upon which the suit is based, and he is taken by surprise by these facts, or if other facts have come to his knowledge since making up the issues, or any other good excuse can be given for not having made up the issues, so as to admit the testimony he desires to offer, he should be permitted to amend upon terms. But a general application to amend an answer so as to set up fraud, without stating what amendment defendant wishes to make, is properly overruled in the discretion of the court.
5. *Mortgages—Mortgagee with power of sale may purchase property, with what limitation.*—A mortgagee with power of sale is a trustee as well as a creditor, and, at his own sale, can not become the purchaser either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void. It is good as to all the world, and for all purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land.

Error to First District Court.

Douglass & Gage, for plaintiff in error.

I. The power of allowing amendments is discretionary with the courts, and, unless such discretion has been abused or unsoundly exercised, the action of the courts in giving or refusing leave to amend is not to be disturbed. (*Garton v. Cannada*, 39 Mo. 364; *Powers v. Nelson*, 19 Mo. 190; *Green v. Gallagher*, 35 Mo. 226; *Ferguson v. Han. & St. Jo. R.R.*, 35 Mo. 452; *Dozier v. Jerman*, 30 Mo. 216; *Chauvin v. Lownes*, 23 Mo. 227.)

II. As the amendment was proposed to be made during the trial, and changed substantially the defense, it was properly refused. (*Gen. Stat.* 1865, pp. 669-70, § 3; *Thompson v. Mosley*, 29 Mo. 497; *Beardsley v. Stover*, 7 How. Prac. 295; 11 Do. 170.)

III. The amendment also proposed to set up title in third parties, strangers to the record, and for this reason was properly refused. (Barber v. Harris, 15 Wend. 615; Laughlin v. Stone, 5 Mo. 43; Page v. Hill, 11 Mo. 149; Doe, Adm'r of Ogle, v. Vickers, 4 Ad. & El. 782; Redman v. Bellamy, 4 Cal. 250.)

IV. The sale was not made by Allen, but by the marshal of the court. That provision in the deed of mortgage passing the title, through Allen, to said marshal is valid. (McKnight v. Warner, 38 Mo. 132.) The marshal then became the trustee, and Allen the beneficiary (*Ex parte* Bennett, 10 Ves. 393); and, as such, he had a perfect and undoubted right to purchase at the sale. (McNair v. Biddle, 8 Mo. 257; Cooley v. Rankin, 11 Mo. 642; Richard v. Holmes, 18 How. 143; Ives v. Ashley, 97 Mass. 198; Howard v. Davis, 6 Texas, 174; Erskine v. De La Baum, 3 Texas, 406.)

J. B. Hovey, for defendant in error.

A trustee can not become a purchaser of trust property placed in his hands for sale, for his own benefit, either directly or indirectly. (White & Tud. Lead. Cas. in Eq., Hare & Wallace's notes, 159, and cases cited; Smith v. Isaacs, 12 Mo. 106; Sugd. on Vend. 368.)

BLISS, Judge, delivered the opinion of the court.

Defendant and wife, with her two brothers, W. W. and Geo. W. Talley, on the first of December, 1859, executed to plaintiff a mortgage of forty acres of land near Kansas City, to secure the payment of defendant's note to plaintiff for \$3,549.73. The mortgage contained a power of sale by the mortgagee, or by the marshal of the Court of Common Pleas of Kansas City, and was acknowledged before a justice of the peace. On the 18th of April, 1862, John G. Hayden, then marshal of said Court of Common Pleas, advertised and sold the property at public sale, and it was bid in for \$3,600 by one S. S. Smith, who afterward deeded it to the plaintiff. The wife of defendant being dead, he continued in possession of the property, and this is an action of ejectment brought against him by the plaintiff.

Allen v. Ranson et al.

The record shows that, upon trial in the Circuit Court, the plaintiff showed title in the wife of defendant and her said brothers at the time of the mortgage, its execution by them, the sale by the marshal, and deed to Smith, and the deed by Smith to him; also, that children were born alive to said defendant and wife.

The claim of the plaintiff seems to have been sharply contested, and various questions were sprung upon him. First, as the case was called for trial, the defendant filed a paper suggesting to the court "that the plaintiff was insane," to which suggestion the court paid but little attention, and directed the trial to proceed, and defendant excepted. I do not see precisely the object of the suggestion, nor does the record intimate it. Even if the suggestion were true, which does not appear, the suit must proceed in the name of the plaintiff, and he might all the more require for his support the possession of his property. (2 Saund. Pl. & Ev. 318; Reed v. Wilson, 13 Mo. 28.) Allen, the plaintiff, is said to be a non-resident, and I see no provision for appointing a guardian in this State.

The defendant also objected to reading the mortgage in evidence, for the reason that it was acknowledged before a justice of the peace; and claims, under the decision of this court in West v. Best, 28 Mo. 551, that such acknowledgment did not pass the estate of the wife. It is not necessary either to approve or overrule the doctrine of that case, inasmuch as the acknowledgment of the defendant is not impeached by the supposed defect in that of his wife. He has both the possession and a life estate in the property; and, having conveyed the property to the plaintiff by this mortgage, can not retain the possession by showing that, when his curtesy ceases, the heirs of his deceased wife may perhaps be entitled to it. There is no such issue now as calls for an adjudication either upon the character of the acknowledgment or the validity of the curative act of February 15, 1864. When the heirs, who are not parties to this record, shall seek to enforce their claim to the property, it will then be necessary to pass upon the validity of the deed as against Mrs. Ranson. It is now sufficient to say that whatever may be the

Allen v. Ranson et al.

effect of the supposed defect in the acknowledgment upon the rights of Mrs. Ranson's heirs, Ranson himself has a possessory title, which is vested in the plaintiff. (Beal v. Harmer, 38 Mo. 439; Bryan v. Wear, 4 Mo. 106.) Besides, a mortgagee, even without foreclosure or sale, may, after maturity of the obligation, maintain ejectment against the mortgagor.

If this view be correct, it disposes of another allegation of error in the record. The defendant, on the trial, sought to compel the plaintiff to make the heirs of Mrs. Ranson parties to this suit, and the court very properly held it to be unnecessary to do so. The defendant is the person in possession, and not the heirs. They hold under him, if they are in at all, and not he under them. They can have no estate during his life; and for the court to have required the plaintiff to make them parties, and establish his rights as against them, as well as against the defendant, would have been a burden it had no right to impose on him.

I find in the bill of exceptions the following statement: "The defendant then offered to prove that the title of plaintiff to the land in controversy, both from Hayden, the marshal, and from Smith, to plaintiff, was a fraud upon defendant. The plaintiff objected, because fraud was not alleged in the answer. * * The court would not let him prove it, and defendant excepted. Defendant then asked leave to amend his answer, at the trial, upon terms so as to set up the fraud he attempted to prove; but the court would not let him," etc., and he excepted. The District Court makes the refusal of the Circuit Court to receive the evidence, or permit the amendment, ground for reversal of the judgment, although the judge delivering the opinion pertinently remarks that "it would have been more satisfactory if the defendant had stated the questions he proposed to propound, in order to elicit the fraud; and, when he offered to amend, to have stated the amendment he proposed to make."

Now, it nowhere appears what the defendant wished to prove, or what amendment he wished to make. He offered to prove a conclusion of law—an inference from facts; but the facts are concealed. The parties had made up their issues, and during their

Allen v. Ranson et al.

investigation the defendant made a general proposition to prove fraud, though what kind of fraud, or how perpetrated, he does not show. Fraud vitiates everything; and if facts were developed upon the trial that would enable the defendant to impeach the transaction upon which the suit was based—if he were taken by surprise by these facts, or if other facts had come to his knowledge since making up the issues, or any other good excuse could be given for not having made up the issues, so as to admit the testimony he desired to offer—he should be permitted to amend upon terms. But he must play an open hand—must disclose his testimony and the nature of his amendment, and show to the court that he is acting in good faith—or he will be suspected of maneuvering for delay. The court committed no error in refusing his testimony, if he had any outside of the issues, and in rejecting his general application to amend. This is necessarily so much a matter of discretion in the court trying the case, that we must presume that discretion was soundly exercised unless the contrary is shown by a full exhibit.

The defendant objected to the plaintiff's right of recovery upon the ground that, as mortgagee with power to sell, he was a trustee; that Smith, at the marshal's sale, simply purchased as his agent; that he, as trustee, had no power to purchase, and hence acquired no such title as would authorize him to take possession of the premises. Admitting the relation between the parties, and that the plaintiff was the actual purchaser, is it true that the sale was void, and that the purchaser acquired no title? It is well settled that a mortgagee with power of sale is a trustee as well as a creditor, and that at his own sale he can not become the purchaser, either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void. It is good as to all the world, and for all purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land. Purchases by some classes of trustees at their own sales are sometimes treated as void, but never in sales of this kind. This subject was fully considered in *Thornton v. Irwin et al.*, decided at last January term (43 Mo. 153), where we held that the mortgagor had a right to redeem, notwithstanding the sale; but I

Fish v. Lightner et al.

know of no case in this or any other court where such sales are treated as a nullity. The instructions to the jury based upon that hypothesis, asked for by the defendant, were very properly refused.

I can see no error whatever in the instructions given at the instance of the plaintiff and excepted to by defendant. They hypothecate a complete case; and the jury are told that if they believe from the evidence the facts hypothecated, they must find a verdict for the plaintiff. It is a convenient way of summing up the facts necessary to be proved, and bringing them directly before the jury, and they are less likely to be deceived than if the instructions were more abstract.

Upon the trial the defendant sought to prove the value of the property, and was not permitted by the court to do so. I can not see for what legitimate object the evidence was offered. The value of the rents and profits was in issue, and evidence was received upon that point, but whether the property would sell for a thousand or ten thousand dollars is not material. The decision either way would not decide the amount of rent to be recovered, or the plaintiff's right to the possession.

The defendant asked for several instructions based upon his claims as heretofore considered, which were refused by the court. It is unnecessary to consider them in detail, as they are all covered by this opinion. One or two of the instructions refused were correct in the abstract, but did not apply to the case.

The judgment of the District Court reversing that of the Circuit Court should be reversed, and the judgment of the Circuit Court be affirmed. The other judges concur.

BENJAMIN FISH, Defendant in Error, v. ADALINE LIGHTNER *et al.*, Plaintiffs in Error.

1. *Partnership—Administration—Surviving partner—Partnership articles—Covenant for conveyance in—Record of final settlement—Res adjudicata—Account of profits.*—A., being the owner of certain real estate with improvements, covenanted, in articles of partnership with B., that on receipt from

Fish v. Lightner et al.

B. of one-half the amount paid for the property, with interest, and half the running expenses, he would convey to him an undivided half of the property. On decease of A., B., as surviving partner, administered on the joint estate. *Held*, that the record of final settlement in the Probate Court, showing a balance of partnership payments in favor of B., was not conclusive evidence that the amount necessary to entitle him to a conveyance had been paid. It was not within the scope and purpose of final settlement to determine such questions. Such a covenant and the payments made in accordance with it were individual, and not partnership, transactions. The conveyance in such case certainly should not be enforced when no accounts were rendered by the administrator of the profits of the estate.

2. *Conveyances, contracts for—Discretion of court as to specific performance.*—Petitions for a specific performance of a contract to convey land are addressed to the sound discretion of the court, which may withhold or grant relief according to the circumstances of each particular case, when general rules and principles fail to furnish any exact measure of justice between the parties.

Error to First District Court.

Hicks, for plaintiffs in error.

H. C. Wallace, and *J. J. Ryland & Son*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This is a chancery proceeding to enforce the specific execution of a clause in a copartnership contract contemplating the conveyance of real estate on certain specified conditions. The party thus contracting to convey having deceased, his administrator, widow, and two minor children are joined in the suit as defendants. The premises in question were acquired by the deceased with a view to their use by the firm of Lightner & Fish in carrying on the livery business in Lexington, Mo., where said premises are situated. The firm was composed of the plaintiff and said deceased, the former being the active manager of the business. It was provided in their articles of copartnership that whenever "said Fish should have paid to the said Lightner one-half of the purchase money of said property—to-wit: one-half of seventy-five hundred dollars—with ten per cent. interest thereon from March 15, 1860, until the whole is paid, and should pay one-half of the expenses of said business, and should pay for one-half of all stock

Fish v. Lightner et al.

and provender necessary to carry on said business," that then said Lightner should convey to Fish one undivided half of said property. The articles of copartnership bear date March 15, 1860. Lightner died July 30, 1861. The petition avers that, prior to his death, the plaintiff had paid him one-half of said purchase money and interest, together with one-half of all the costs, charges, and expenses incident to said livery business, and that the plaintiff had performed all the conditions and stipulations of said contract obligatory upon him. The answer filed put in issue the truth of these averments. If the evidence sustains the allegations of the petition, then the relief prayed for ought to be granted; otherwise not.

The plaintiff, as surviving partner, administered upon the firm assets, and wound up the affairs of the partnership. In support of the allegations of payment, the plaintiff offered in evidence the record of proceedings of the Lafayette Probate Court on the occasion of the final settlement by the court of the plaintiff's administration account. The transcript was admitted over the defendant's objections. It shows a final settlement of the plaintiff's administration account, and an ultimate balance in his favor of \$1,058.22. This, it is insisted, conclusively establishes the fact of payment as alleged in the petition; and it is undoubtedly conclusive upon all matters which were legitimately before the court and directly in issue, and which the court specifically passed upon. But was the issue raised by these pleadings before that court? Did it undertake to adjudicate the question whether Fish, prior to the death of Lightner, had paid the \$3,750 and interest, so as to entitle him to a conveyance? Was it within the scope and purpose of that accounting to settle questions of this character? If not, then the question was not concluded by that settlement; for the adjudication was conclusive only for the purposes for which it was made. It did not conclude matters collaterally introduced or recited; nor did it establish the fact that any particular firm-creditor was paid, because the accounts may have contained an entry to that effect, and the court may have made an allowance to the administrator accordingly. Many things may be introduced into an administration account which do not neces-

Fish v. Lightner et al.

sarily become *res adjudicata* in consequence of the judgment of the court thereon. (1 Greenl. Ev. § 528; Redf. on Wills, part II, pp. 894-5; Sparhawk v. Buel, 9 Verm. 41.) We do not consider the question litigated here to have been so involved and in issue in the proceedings before the Lafayette Probate Court, in the settlement of merely partnership matters, as to cut off all inquiry into the equitable merits of the case before us. The question contested here relates to transactions between Lightner in his lifetime, on the one side, and Fish on the other, as individuals merely, and not as partners. Their bargain in regard to the sale and conveyance of land was in no sense a partnership act. It was antecedent to the existence of the partnership, although embodied in the copartnership articles out of which the partnership sprung. A clause was incorporated in these articles whereby Lightner, on certain conditions, agreed to convey, but Fish did not therein even agree to comply with the conditions and take the property. He did not therein agree to buy at all. Lightner's contract, in this connection, was in the nature of a standing offer to sell and convey in case Fish should thereafter conclude to make, and should actually make, the required payments. Fish's subsequent action in accepting and complying with the prescribed conditions, if he did so, was purely private, personal, individual action. Whether or not he in fact made the necessary payments is a question between him, as an individual, on the one part, and Lightner or his legal representatives on the other. It is not a partnership inquiry, or necessarily connected with the partnership accounts or dealings, although payments may have been made from Fish's share of the profits.

On looking into the accounts filed with the Probate Court, constituting a part of the transcript under consideration, we fail to find any profit and loss account, or any account or statement showing the profitableness or unprofitableness of the firm-business of Lightner & Fish. There is nothing on this subject. It is apparent upon the face of the accounts that the profits of the business, whatever they were, all went to the benefit of Fish. Lightner got nothing. The court in no way attempted to ascertain and apportion the profits; and yet this was a

Fish v. Lightner et al.

proceeding essential to any just settlement between the parties. Apparently the profits were considerable. It is averred in the petition that Fish's means at the commencement of the partnership were quite limited, and that fact is set out as the inducement to the contract then made. It was for that reason that Lightner bought and held the property in his own name and under his own control, giving Fish an opportunity to acquire a moiety of it from the anticipated profits of the proposed business. Fish embarked in the enterprise, and appears to have been prosperous. By the contract, he was to give his time and services exclusively to the firm and its interests. He alleges that he did so. He conducted the business, and with success, as it would seem; for in sixteen months he found himself in a condition to hold the firm-property, or a moiety of it, in his own name. In this short time his pecuniary circumstances had entirely changed. All the facts of the case indicate that this increment of means resulted from the profits of the firm-business, in which Lightner was equally interested with himself. The contract between them expressly provided that the partnership should date and take effect from and after the 15th day of March, 1860. Its whole structure shows that there was to be a mutual participation in the profits of the business from the outset. This important question in regard to the profits was wholly overlooked by the Probate Court, and has never been adjusted. Until that is done, it is impossible to determine the standing of the parties between themselves, or what may have been the result of their mutual dealings. To make a final decree in the present state of the accounts and proofs, vesting an undivided half of the title to the real estate in question in Fish, would be to take a step in the dark, which we are not inclined to do; nor do we discover any necessity for doing so.

Applications of this kind—petitions for a specific performance of a contract to convey land—are addressed to the sound and reasonable discretion of the court, which withholds or grants relief according to the circumstances of each particular case, when general rules and principles fail to furnish any exact measure of justice between the parties. (2 Sto. Eq. Jur. § 742.)

Abbott v. Sheppard et al.

Under the existing circumstances of this case, we are neither disposed to affirm the decree nor dismiss the petition. As a measure more likely to result in justice to both parties, the judgment below will be reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion. It may turn out, upon an adjustment of the profit and loss account, and a full settlement of the partnership affairs, that the plaintiff may be entitled to a decree as prayed for, but that does not yet appear.

The judgment is therefore reversed and the cause remanded. The other judges concur.

JOEL ABBOTT, Appellant, v. H. SHEPPARD *et al.*, Respondents.

1. *Judgments in personam, where no property was attached, held invalid.*—A judgment merely in *personam* against a non-resident debtor founded on notice by publication, as provided by section 13, p. 1224, R. C. 1855, is void, and may be impeached collaterally. The publication gave the court no jurisdiction over his person. Plaintiff by attachment under such notice might secure jurisdiction over the specific property attached, but not over the person or any other property.

Error to Third District Court.

T. A. Sherwood, and *James F. Hardin*, for appellants, relied on 8 Cal. 449; 9 Cal. 111; 12 Cal. 102, 283; Laws of Cal., 1850-3, §§ 30, 31, p. 524; *Pomeroy v. Betts*, 31 Mo. 419; *Janney v. Spedden et al.*, 38 Mo. 395; 14 Wis. 591; 33 Barb. 71; 33 N. H. 228; *Story's Conflict of Laws*, §§ 546, 549; 10 Wis. 501, 563; 13 Wis. 222; 5 Mason, 35; 1 Barb. 291; *Douglas v. Forrest*, 686; 21 Verm. 535; 11 How. 165; 5 Ga. 94; 24 Texas, 468; 4 Zab. 333; 11 Ohio, 511; 20 Cal. 81; 22 How. 352; 22 Mo. 335.

John S. Phelps, and *James Baker*, for respondents.

The judgment against Wooten was void. (*Smith v. McCutchen*, 38 Mo. 415; *Janney v. Spedden*, *id.* 395; *Latimer v. Union Pacific Railway*, 43 Mo. 105; *Boswell v. Dickinson et al.*, 4

Abbott v. Sheppard et al.

McLean, 262 ; Boswell's Heirs v. Otis *et al.*, 9 How. 336 ; Story's Conflict of Laws, § 539 ; 11 How. 459 ; 5 Mason, 40, 42, 47, 53 ; 38 Mo. 415 ; 2 Iowa, 461 ; 6 Iowa, 183 ; 10 Iowa, 576 ; 15 Johns. 139.)

BLISS, Judge, delivered the opinion of the court.

The petition in this case is for specific performance. Defendants sold a lot in Green county to one Wooten, who, as the petition alleges, paid for the same, but received no deed. The interest of said Wooten in the lot was levied on and sold upon execution, and bid in by assignor of plaintiff, and the plaintiff now seeks a deed from the original vendors. Among the defenses set up is the claim that the judgment, upon which the execution against Wooten and others was issued, was void, for the reason that no process had been served in the case ; that the defendants were all non-residents of the State, and that they were notified by publication, as provided in section 13, p. 1224, of the Statutes of 1855. The record shows that such was the fact ; that the original proceedings against Wooten and others were founded upon a common indebtedness — were altogether *in personam*, and had no relation to the property in dispute ; that, upon affidavit of non-residence, the clerk ordered notice by publication ; that such notice was given, judgment by default rendered, common *fieri facias* issued, and Wooten's interest in the property sold to one Lindenbower, who assigned to plaintiff.

This question has been too often decided to admit of discussion. The judgment against Wooten was void, and can be impeached collaterally. The publication gave the court no jurisdiction over his person, and no valid judgment could be rendered. His creditors might have proceeded by attachment against specific property, and would acquire jurisdiction over that property, but not over the person or over any other property. The provision in the act of 1855 is happily deprived of its ambiguity by the act of 1864, but it never did authorize, and I might say never could authorize, a general judgment against a non-resident without notice. Such a proceeding could hardly be called "due process of law." This subject is so well discussed in Smith v. McCutchen (38 Mo. 415),

Jarrett v. Morton.

and in *Latimer v. Union Pacific Railway* (43 Mo. 105), that further remark would be superfluous.

The Circuit Court held the judgment against Wooten to be void, and gave judgment against the plaintiff, from which he appealed to the District Court. The transcript of the record shows that the District Court reversed the judgment of the Circuit Court, and remanded the cause, from which the plaintiff again appealed to this court. Counsel on both sides have treated the case as though the judgment in the District Court were one of affirmance instead of reversal. But the case is here, and the mistake, if there be any, will not prevent us from disposing of it.

In our opinion, the judgment of reversal in the District Court should be reversed and the judgment of the Circuit Court be affirmed. The other judges concur.

H. R. JARRETT, Plaintiff in Error, v. J. F. MORTON, Defendant in Error.

1. *Notes—Fraud and deceit—Settlement should be repudiated before commencing proceedings on original claim.*—Defendant was sued for the services of a slave. He denied the indebtedness, but, to avoid a controversy, “squared off” by giving plaintiff a certain note on which sundry payments had been indorsed. Plaintiff took the note without examination, collected the money, and pocketed the proceeds. Because it turned out that the amount due on the notes was less than plaintiff’s claim, he could not treat the claim as unadjusted, and sue for the balance, on the plea of fraudulent misrepresentation by defendant concerning the amount remaining due on the note. Before commencing proceedings on his original claim, he should have tendered back the note received of defendant, and should have repudiated the settlement; or he might have prosecuted directly for the deceit, abandoning entirely his original cause of action. In that case he could retain the note, and recover, in addition, all he had suffered by the deception.

Error to Third District Court.

T. A. Sherwood, for plaintiff in error, relied, among others, upon the following authorities: *State v. Harrold*, 38 Mo. 496; *State, to use, etc., v. Smith*, 31 Mo. 566; *State v. Wissmark*

Jarrett v. Morton.

et al., 36 Mo. 592; *Young v. White*, 18 Mo. 93; *Beale v. Cullum*, 31 Mo. 258; *Bay v. Sullivan*, 30 Mo. 191; *Gonsolis v. Gearhart*, 31 Mo. 585.

McAfee & Phelps, for defendant in error, relied upon the following authorities: 2 Pars. on Cont., 5th ed., 780-2; *Moyer v. Shoemaker*, 5 Barb. 319; *Matteawan Co. v. Bentley et al.*, 13 Barb. 641; *Wheaton v. Baker*, 14 Barb. 594; *Masson v. Bovet*, 1 Den. 69; *Hogan v. Weyer*, 5 Hill. 389; *Chit. on Cont.* 646, 748; 1 Greenl. Ev. § 192.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings his *quantum meruit* to recover for the services of a slave who was taken by the defendant, in January, 1862, from Greene county to Arkansas, and returned with him in 1864. The plaintiff recovered \$20 in the Springfield Common Pleas, and the judgment was reversed in the District Court. The only matters complained of, or that can be considered, arise from the charge to the jury upon the trial below.

There were two defenses. First, that the services were worth nothing; and, second, an accord and satisfaction. The plaintiff had frequently demanded of the defendant payment for the services, and the latter uniformly disclaimed any indebtedness; but finally the plaintiff told him if he would give him a certain promissory note held by defendant against one Reynolds, upon which plaintiff was security, he would "square off." Defendant gave him the note, which he put in his pocket without examination. The note was for \$90, with indorsements, so that only about \$50 were due upon it, which amount plaintiff collected. The plaintiff claims that there was no accord and satisfaction, for the reason that defendant deceived him in regard to the note, having induced him to believe that it was given for \$125, and had been on interest for several years. The deception upon which he relied occurred some two years before, when he was endeavoring to buy the slave he afterward took to Arkansas. The plaintiff testifies that defendant then offered the note, among other things, in payment, and represented that it was given as above; and that, when

Jarrett v. Morton.

he agreed to take it in satisfaction of his claim, he supposed there were nearly \$200 due on it.

The defendant complains of the following instruction given on behalf of the plaintiff, to-wit: "7th. That although the jury may believe from the evidence that the plaintiff received from the defendant a note for \$50, and applied the same to his own use, yet if the jury also believe from the evidence that plaintiff received said note by mistake, and through deception and fraud of the defendant, they will not regard the reception of said note as a compromise and settlement, although plaintiff never returned or offered to return said note."

The same point is raised in the following instruction, asked by defendant and refused: "3d. That if plaintiff had been previously misled by defendant as to the amount due on said note, or was mistaken as to the amount due on said note, at the time he accepted the same for the services of the said Wyatt, yet, after discovering the mistake or misrepresentation, did not return or offer to return said note to defendant, but collected the same for his own use, the jury will find for defendant."

The giving of the above instruction, marked "7th," and refusal of the other, were clearly erroneous. The delivery of the note to the plaintiff was not made in payment or part payment of an acknowledged debt, but in settlement of a disputed claim. The defendant never acknowledged that he owed anything—always denied it—but, to avoid a controversy, at the solicitation of the plaintiff, he "squared off" by giving him the note. It was a compromise—a full settlement of the dispute. It extinguished the claim. But the plaintiff finds the note less than he expected, and complains that he is deceived. And what does he do? Does he at once, upon discovery of the deception, look up the defendant, and repudiate the settlement? Not at all. But he holds on to the price of the settlement, collects the note, pockets its proceeds, and still treats the claim as never having been adjusted. This the law will never permit. If the plaintiff would repudiate the settlement, he must put the other party in the same condition he was before it was made. He can not appropriate its benefits and deny its obligation. There never was but one doctrine upon

State ex rel. Koch v. Draper.

this subject; and the books are full of decisions that if a party would rescind a contract for fraud or other cause, he must, as far as in his power, put the other party in the condition he would have been in had the contract not been made. Before commencing proceedings on his original claim, the plaintiff should have tendered back the note received of defendant—should have repudiated the settlement—and then he would have been at liberty to impeach it if set up against his claim. But, as it is, he hangs on to it, and is not at liberty to deny its validity.

Another mode of redress against the alleged fraud was opened to him. If he desired to affirm the contract of settlement, he might have prosecuted directly for the deceit, abandoning entirely his original cause of action. In that case he could have retained the note, and recover, in addition, all he had suffered by the deception.

The judgment of the District Court, reversing the judgment of the Court of Common Pleas, is affirmed. The other judges concur.

STATE *ex rel.* LOUIS F. KOCH, Petitioner, *v.* DAN'L M. DRAPER,
State Auditor, Respondent.

1. *State Senate — Resolution — Clerk of committee — Per diem for services.*—
The resolution passed by the State Senate, January 20, 1869, which provided that the clerk of the committee on banks and corporations should "not be entitled to more than one *per diem*," was not intended to prevent him from performing services for a committee of the State House of Representatives, and receiving a *per diem* therefor, while he was so employed and paid by the Senate.

Petition for mandamus.

A. Budd, for relator.

H. B. Johnson, Attorney-General, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The relator acted as clerk of three several Senate committees, from January 20, 1869, to the 16th day of the following February, under the following Senate resolution: "Resolved, That the

Ex parte Meyers.

committees on banks and corporations, ways and means, and internal improvements, be allowed a clerk: *provided*, that said clerk shall perform the duties of the committees and receive the usual *per diem*; and said clerk shall not be entitled to more than one *per diem* for the time actually employed, which shall be certified by the chairman of the committees, to be paid for out of the contingent fund of the Senate." The relator's claim for services as clerk of these committees, amounting to \$135, was duly certified, as required by the resolution and by the appropriate officers of the Senate. The only objection to allowing it, stated in the auditor's return to the alternative writ, consists in the alleged fact that the relator was, during the same period covered by the account, employed by a House committee and paid his *per diem* out of the House contingent fund. This fact is supposed, under the Senate resolution, to cut out the relator's right to his *per diem* compensation for services rendered the Senate committees. This is a mistaken view of the subject. A correct interpretation of the Senate resolution leads to no such result. The clerical services therein contemplated were to be rendered to three different committees of the Senate, and the restriction has reference to this fact. The relator was to have but one *per diem*, although serving three committees. He was not to have a *per diem* for each. It has no reference to the action of the other branch of the Legislature or to payments for services granted by it.

The peremptory writ will issue. The other judges concur.

Ex parte GEORGE MEYERS.

1. *Crimes and punishments—Sentences at different terms of court upon the same person, effect of.*—Section 9, chapter 207, Gen. Stat. 1865, concerning terms of imprisonment in case of a criminal convicted of more than one offense, applies only where he is convicted of two or more offenses at the same term; and both convictions, under that provision, must take place before the sentence is pronounced in either case. And where a prisoner was sentenced, at the March term, 1866, of the St. Louis Criminal Court, to impris-

 Ex parte Meyers.

onment for two years, for grand larceny, and at the May term of the same court he was again convicted and sentenced on another indictment for grand larceny for a period of three years, he will be entitled to his discharge at the expiration of three years.

2. *Criminal law—Courts have no common-law jurisdiction—Separate sentences, how pronounced.*—The courts in this State have no common-law jurisdiction in felonies. The powers that they exercise are such as are conferred by statute only; and separate sentences can only be passed upon the prisoner in the cause in the manner provided by statute.
3. *Crimes and punishments—Imprisonment commences with day of sentence—Criminal can not afterward be tried till expiration of term.*—As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment. Then, in legal contemplation, he is in custody different from that of the Criminal Court, and can not again be put upon trial till he has served out the term of imprisonment assessed against him.

Petition for habeas corpus.

Lay & Belch, attorneys for petitioner, cited 2 Metc., Ky., 271; 11 Ind. 389.

H. B. Johnson, Attorney-General, for respondent, cited *State v. Truman*, ante, p. 181; Gen. Stat. 1865, §§ 35-6.

WAGNER, Judge, delivered the opinion of the court.

The petitioner states that he is illegally detained, confined, and restrained of his liberty in the penitentiary of the State of Missouri; that he is illegally held and restrained under two commitments and judgments of the St. Louis Criminal Court, rendered at its March term, 1866—the first of the date of March 31, 1866, for the term of two years, and the second at the same term of the Criminal Court, of the date of June 8, 1866, for the term of three years, and that the time for which the petitioner was committed has expired; and he prays that he may be released and discharged. Copies of the records of conviction and commitment are annexed and made exhibits.

The counsel for the petitioner is evidently mistaken in supposing that both convictions and sentences were had and passed at the same term of the Criminal Court. The record shows that at the March term, 1866, the prisoner pleaded guilty to a charge of grand larceny, and was sentenced at the same term to impris-

Ex parte Meyers.

onment for two years. At the May term, 1866, he was tried on another indictment for grand larceny, and found guilty, and his punishment assessed at three years' imprisonment in the penitentiary, upon which assessment he was duly sentenced and committed at the same term. It must be borne in mind that the St. Louis Criminal Court holds six terms a year. The prisoner was twice found guilty, and sentenced on each finding at different terms.

This case does not come within the provisions of chapter 207, section 9, of General Statutes, which declares that when any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction. This section applies only where a person is convicted of two or more offenses at the same term, and both convictions must take place before the sentence is pronounced in either case. The law certainly contemplates that after a prisoner is sentenced he will be immediately transferred to the custody of the penitentiary, and not be detained for future arraignment at subsequent terms. If such a course of practice had been intended, the statute would surely have made some provision for it. When a person, in committing a burglary, also commits a larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment; and, on conviction, he may be punished not only for the burglary, but an additional term for the larceny. (Gen. Stat. 1865, p. 785, § 19.) But the additional punishment rests upon an express statutory provision. In the present case there is nothing in the judgment of the Criminal Court or the commitments stating when the second term shall commence, but there is nothing in the statute requiring it; for, in fact, it is a proceeding not within the purview of the statute. In Indiana, where a person was sentenced on two several indictments to imprisonment in the State prison for two years on each—the term of imprisonment on the second charge to commence at the expiration of the term on the first—it was

Ex parte Meyers.

held that as there was no statute in force providing that one term of imprisonment should commence at the expiration of another, both terms commenced and elapsed concurrently; and that, at the end of the first two years, he might be discharged on a writ of *habeas corpus*. (Miller v. Allen, 11 Ind. 389.) Where a prisoner was found guilty by verdict on two indictments for separate felonies, and his punishment was assessed in each case to confinement in the penitentiary for a period of five years, the court rendered the following judgment: "It is considered by the court that the prisoner be confined in the jail and penitentiary house of this commonwealth to hard labor for the space of five years on each indictment." It was determined by the court that the legal effect of the judgment was that the prisoner should be confined for five years only; that such confinement should be on each indictment, and that both terms of five years should commence and terminate simultaneously. (Jones v. Ward, 2 Metc., Ky., 271.)

The courts in this State have no common-law jurisdiction in felonies, and the powers that they exercise are such as are conferred by statute only. In England, where the criminal practice is largely founded on the common law, a different system may prevail. There the punishment is largely left to the discretion of the court. The time that the prisoner is to be confined is not determined by the jury; they simply pass upon his guilt, and the duration of the imprisonment is fixed by the court. The court, having the power to prescribe the length of time, may sentence the prisoner to several terms in succession, where he is charged with several offenses, because it could inflict the same amount of punishment in each case separately. But no such practice prevails here. Separate sentences can only be passed upon the prisoner in the cases and in the manner pointed out by the statute. There is no provision anywhere made, that I have been able to find, where separate sentences can be passed upon a prisoner, and he be subjected to more than one term of punishment, unless the different convictions were had at the same term, and both were obtained previous to the sentence. But there is no authority for convicting a prisoner of felony at one term of the

State ex rel. Missouri Mutual Life Ins. Co. v. King.

court, and regularly passing sentence upon him, and then remanding him to jail till the next succeeding term, and again convicting and sentencing him for another felony. As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment; then, in legal contemplation, he is in a custody different from that of the Criminal Court, and can not again be put upon trial till he has served out the term of imprisonment assessed against him. The prisoner has already served out more than the length of time prescribed by the longest sentence, and I think that he is entitled to his discharge.

Prisoner discharged. The other judges concur.

STATE *ex rel.* MISSOURI MUTUAL LIFE. INSURANCE COMPANY,
Petitioner, *v.* WYLLIS KING, Superintendent of the Insurance
Department of Missouri, Respondent.

1. *Insurance companies — Act of March 10, 1869 — Real estate securing stock of companies formed under, limited to Missouri.*—It was the intention of the act of March 10, 1869, concerning life insurance (Sess. Acts 1869, p. 32, § 19), that the security given by insurance companies to the superintendent of the insurance department, to enable them to do business, should be founded on unencumbered real estate situated in Missouri. This construction is borne out by sections 34 and 35, under which foreign insurance companies doing business in this State must obtain from the commissioners of their own States guarantees as to the solvency of the securities given by them.
2. *Statute, construction of—Intention should be carried out.*—Generally, where words used in a statute are clear and unambiguous, there is no room left for construction; but when it is perceived that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and made to control the strict letter.

Petition for mandamus.

Ewing & Holliday, and Moss & Sherzer, for relator.

Hitchcock & Lubke, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The relator, a corporation organized under the laws of this State, in compliance with an act for the incorporation and regulation of life assurance companies, approved March 10, 1869,

State ex rel. Missouri Mutual Life Ins. Co. v. King.

tendered to the respondent, who is superintendent of the insurance department, \$100,000, in notes secured by deeds of trust on unencumbered real estate worth at least double the amount loaned. Included in this amount was a note of one Rufus Ford for \$6,750, secured by a deed of trust on unencumbered real estate situated in the State of Illinois. The respondent refused to receive this security of Ford, and refused to give the proper certificate of deposit, and a certificate authorizing the relator to transact business, for the reason, solely, that the real estate was situated in Illinois, and that, under the law, he had no authority to receive notes or bonds that were secured by deeds of trust on real estate lying elsewhere than in the State of Missouri. This is the only question presented, viz: whether, under the law relating to insurance, the notes and bonds to be deposited with the superintendent must be secured on unencumbered real estate situated within our own territorial limits; or whether the property, providing that it is unencumbered, may be situated elsewhere.

The law on which this contest arises is the nineteenth section of the act for the incorporation and regulation of life assurance companies. (Sess. Acts 1869, p. 32.) Among other things, that section provides that "no joint-stock or stock and mutual company formed under the provisions of this act, or of any general or special law of this State, for any purpose mentioned in the first section of this act, shall commence or hereafter continue to do business or issue policies unless upon an actual capital of at least \$100,000; nor shall any such company commence or hereafter continue to do any business unless the full amount of capital stock named in its charter or articles of association shall have been in good faith subscribed, nor until such company shall have at least \$100,000 of its capital paid in and invested in stocks or bonds of the State of Missouri, or in treasury notes or stocks of the United States, or in notes or bonds secured by mortgages or deeds of trust on unencumbered real estate worth at least double the amount loaned thereon," etc.

It must be conceded that the law is indefinite as to any designation in regard to where the land shall be situated. The only positive requirement is that the real estate shall be unencumbered,

State ex rel. Missouri Mutual Life Ins. Co. v. King.

and worth at least double the amount loaned thereon. But what was the intention of the law-makers? It is generally true that where words used in a statute are clear and unambiguous there is no room left for construction; but when it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and carried out, and made to control the strict letter. The very frame-work of the insurance law, and object in passing it, was to afford ample protection and indemnity to the policy-holders. One of the means of securing this protection was by depositing notes or bonds on unencumbered real estate. The duty necessarily devolves on the superintendent of judging of the sufficiency of these securities. It was reasonably supposed that the superintendent would have a tolerably accurate opinion as to the value of lands in Missouri, or at least the means would be accessible to enable him to form a judgment. But by what means could he form any idea as to value if the lands are situated in another jurisdiction? Where they happen to lie in immediate proximity to this State, there might be no difficulty; but if it is admitted that they may be situated elsewhere, no limits can be prescribed or imposed. Upon the presentation of the notes or bonds, with the evidence that they are secured upon unencumbered real estate, the superintendent would be bound to receive them and issue appropriate certificates. The lands might even lie in a foreign dominion; for, if there is no authority to restrict them to Missouri, there is an equal absence of authority for saying that they shall be embraced in the territories of the United States. But even admit that the real estate must be situated within the boundaries of the general government, the case would still be no better. Notes or bonds might be presented, secured by mortgages or deeds of trust on lands situated on the extreme slopes of the Pacific, or in Utah, Colorado, or Florida. By what means could the superintendent judge of their sufficiency? He has no power to employ agents or attorneys to investigate the matter, and it would be impracticable if he had. The liability to deception, fraud, and imposition would be great; and the very purpose which led to the enactment of the law—namely: to supply a solid

The Merchants' Bank of St. Louis v. Easley.

and substantial basis, to which policy-holders could look for indemnity and security—would be evaded and defeated. My opinion is that it was the intention of the act that the security should be founded on unencumbered real estate situated in Missouri. This construction seems to derive aid from the thirty-fourth and thirty-fifth sections of the same act, where provision is made in regard to the deposit of securities by foreign insurance companies in the States where they are chartered. In such cases the companies doing business here, before they are authorized to transact business, must file with the superintendent of the insurance department of this State the certificate of the commissioner or superintendent, or chief financial officer in the State where the deposit is made, stating that he holds in trust and on deposit, for the benefit of all the policy-holders of such company, the notes, stocks, and securities required; and stating the kind of such notes, stocks, and securities, and the amount of each, and that he is satisfied they are worth \$100,000. These provisions show that it was intended in all cases that the commissioners or superintendents should have knowledge not only of the amount but of the solvency of the securities. But the superintendent can not obtain this knowledge; and his office is rendered inefficient unless the law be so construed as to bring the means of investigation within his jurisdiction.

The writ to compel respondent to receive the note of Ford, and to issue the certificates, should be denied. The other judges concur.

THE MERCHANTS' BANK OF ST. LOUIS, Plaintiff in Error, v.
MILLER W. EASLEY, Defendant in Error.

1. *Bills of exchange, action on—Failure of notice of dishonor, excuses for—Burden of proof.*—In an action against the drawer of a bill of exchange, who had received no notice of its dishonor, it was sufficient for plaintiff, in order to bring his case *prima facie* within the rule which excuses want of notice, to allege in his petition that defendant had no funds in the hands of the drawee; and if there are other facts in the knowledge of defendant neutralizing the effect of this excuse, the burden of pleading them is with him.

The Merchants' Bank of St. Louis v. Easley.

2. *Bills of exchange, action on — No funds in hands of drawee — Accommodation drawer — Presumptions.*— In an action against the drawer of a bill of exchange, he would be entitled to notice of dishonor, even though he had no funds in the hands of the drawee, if he were an accommodation drawer. But in the absence of countervailing testimony, he will be presumed to be an interested party. The *onus* of proving the contrary is upon him.

Error to Third District Court.

James F. Hardin, for plaintiff in error, cited Byles on Bills, 203, 231-2; Chit. on Bills, 1st London ed., 56-8; *id.*, 12th Am. ed., 327; Morrison v. McCartney, 30 Mo. 183; Edw. on Bills, 449-52, and authorities there cited; Sto. on Bills, 367-9, 310, 311; 3 Kent, 110, 111; French v. Bank, 4 Cranch, 153; Dickens v. Beal, 10 Pet. 572; Kemble v. Mills, 2 Scott, New R., 121; Williams v. Brashear, 19 La. 370; Foard v. Womack, 2 Ala. 368; Wollenweber v. Ketterlinus, 17 Penn. St. 389; Oliver v. Bank of Tennessee, 11 Humph. 74; Allen v. King, 4 McLean, 128; Durrum v. Hendrick, 4 Texas, 495; Miser v. Trovinger, 7 Ohio St. 281; Blankenship v. Rogers, 10 Ind. 333.

James Baker, and *T. A. Sherwood*, for defendant in error, cited 1 Pars. on Notes, etc., 555; 4 Cranch, 141; 7 Ohio St. 281; Smith's Merc. Law, 331-2; 10 Conn. 308.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs sued on a bill of exchange drawn by the defendant on a third party, by whom it was accepted. The payee and another party indorsed the bill, and it was thereupon discounted by the plaintiffs. It matured and was not paid. No notice of its dishonor was given to the defendant. The plaintiffs, to excuse this neglect, aver in their petition that the drawer had no effects in the hands of the drawee, either at the time the bill was made, or at its maturity, or at any time during the intervening period. The evidence and verdict sustain these averments. A well-understood rule of commercial law makes it the duty of the holder of a dishonored bill of exchange, immediately upon its dishonor, to notify all prior parties thereto on whom he would fix liability for ultimate payment. The plaintiffs seek to take the present case

The Merchants' Bank of St. Louis v. Easley.

out of this general rule, and to bring it within the scope of a well-recognized exception thereto, namely: that such notice may be dispensed with (as also presentment) where the drawer has no effects in the hands of the drawee, as the facts are alleged to exist in the present suit. (1 Sto. on Bills, § 367, and notes; 1 Pars. on Notes and Bills, 463, and cases cited.)

The allegations of the petition, which are sustained by the verdict, bring the plaintiff's case *prima facie* within this exception. But the exception itself has various qualifications, as where the drawer kept an open account with the drawee, with fluctuating balances, or has consigned to him merchandise, and was so situated in relation to the drawee that the drawer had a just and reasonable expectation that the bill would be duly provided for at maturity. In such cases the drawer is entitled to notice, notwithstanding that, in the result, these expectations entirely failed. (1 Pars. on Notes and Bills, 535 *et seq.*) The question therefore arises whether it was not the duty of the plaintiffs, by their pleadings and evidence, to exclude these qualifying circumstances, in order successfully to relieve themselves from the general rule, the effects of which they are seeking to escape. These qualifying matters, it is obvious, lie peculiarly within the knowledge of the opposite party, and are difficult of proof by the plaintiffs. It would seem reasonable, therefore, that the person possessing the knowledge should allege the qualifying facts in defense, and make proof thereof; and so the courts seem to hold. (1 Man. & Gran. 757, 771; 4 Texas, 495; 5 Ala. 712; 5 Smedes & M. 379; 1 Pars. on Notes and Bills, 550, and note *i*, p. 544.) It was enough, then, for the plaintiffs to state facts sufficient to bring the case *prima facie* within the scope of the exception. If there were other facts within the knowledge of the opposite party, neutralizing the effect of these, it was appropriately left to that party to plead them in defense.

The defendant, however, urges the further objection that he stands in the attitude of an accommodation drawer for the benefit of the other parties to the bill, and insists that he ought to have had notice for that reason. If that were his true relation to the bill, and to the other parties, there might be force in the

The Merchants' Bank of St. Louis v. Easley.

objection, since the failure of notice might have affected him injuriously in respect to his recourse against the real principals of the bill.

But how stands this matter? The plaintiffs aver in their petition that the bill was made for the accommodation of all the parties to it, thus apparently assuming the *onus* of proof on this point. The defendant takes issue on this averment, and denies that the bill was made for his benefit. The plaintiffs' averment might, perhaps, be treated as surplusage; but I will not consider that view, since it is not necessary to a disposition of the case. No evidence was produced on the trial bearing on this issue except the bill of exchange itself. That was in evidence. What was its effect?

The original and foundation idea of the commercial instrument called a bill of exchange is that the drawer has funds or effects in the hands of the drawee which the drawer wishes to avail himself of at the place where the bill is made—the drawer being the party primarily interested in and benefited by the transaction. By this instrument of exchange he appropriates the fund, actual or anticipated, in the drawee's hands, and receives the consideration for the appropriation from the payee to whom the instrument of appropriation is delivered. He therefore stands on the face of the paper as an interested and benefited party. His position implies this, and the paper itself is evidence of his interest—evidence that the bill was drawn for his benefit. If he would avoid the legal inference deducible from his position, he must furnish the countervailing proof to rebut and overcome these inferences. The *onus* is on him. In the absence of such countervailing proof he must be held as an interested and benefited party—as drawing for his own use. It is not to be presumed that he drew for the accommodation of others. The presumption, as already stated, is directly the other way. Situated thus, drawing for his own benefit, and having no effects with the drawee, notice to him of non-payment would have been the idlest of ceremonies.

Upon the whole case I reach these results: The defendant is not shown to be an accommodation drawer. The bill upon its

The Merchants' Bank of St. Louis v. Easley.

face implies the contrary. The verdict establishes the fact that the drawee had no effects of the drawer in his hands ; and this was sufficient, *prima facie*, to excuse non-notice. If there were qualifying circumstances, taking the case out of the exception and bringing it under the general rule, these are not shown, and the *onus* is on the defendant.

The judgment of the District Court reversing the judgment of the Circuit Court is therefore reversed, and the judgment of the Circuit Court affirmed. The other judges concur.

[END OF JULY TERM.]

CASES.
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
AUGUST TERM, 1869, AT ST. JOSEPH.

JAMES LAFFERTY and JOSHUA LAFFERTY, Defendants in Error,
v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Plaintiff in
Error.

1. *Railroad — Damages — Construction of statute — Actual collision required under.*—Section 43, chapter 63, Gen. Stat. 1865, contemplated a direct or actual collision between the train and the animal injured. In such case the company should be responsible for the penalty given by the statute; otherwise not. The act was intended not only for the benefit and protection of owners of stock, but also as a public regulation for the safety of passengers and the traveling public, who are exposed to danger and peril in case of collision.

Error to Fifth District Court.

Carr, Hall & Oliver, for plaintiff in error, cited 1 Hill. on Torts, 372, § 36, note a; Redf. on Railw. 493; Pennsylvania Railway v. Haskett, 10 Ind. 409; Gen. Stat. 1865, p. 601, § 5.

Dixon & Murphy, for defendants in error, cited Morgan v. Cox, 22 Mo. 373; 16 Mo. 508; 11 Mass. 137; 18 Johns. 256,

Lafferty et al. v. Hannibal and St. Joseph R.R. Co.

288; 19 Johns. 381; 26 Mo. 441; 42 Mo. 193; 31 Miss. 156; 2 Comst. 165; 3 Hill. 612; 35 Mo. 457; 39 Maine, 273; 24 Verm. 488; 15 East. 388; 4 Den. 464; 8 Barb. 427.

WAGNER, Judge, delivered the opinion of the court.

This was an action for damages, and asking for the statutory penalty. The petition, in substance, states that plaintiffs' horses got on the track of defendant's railroad where it was not fenced, and where there was no road crossing, and, while so on the track, they were frightened by the cars and engine of the defendant; and, getting off the track of said railroad, they were injured.

The Circuit Court sustained a demurrer to this petition, and, on appeal to the District Court, the decision of the Circuit Court was reversed.

The only question requiring consideration is the true meaning and proper construction to be placed upon the forty-third section of chapter 63, Gen. Stat. 1865. That section declares that every railroad corporation formed or to be formed in this State, and every corporation formed or to be formed under that chapter, shall erect and maintain good and substantial fences, on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed prairie lands, of the height of at least five feet, with openings or bars and gates therein, and farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroads; and also to construct and maintain cattle guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules, and all other animals, from getting on the railroad. The section further provides that until such fences, openings, gates or bars, farm crossings or cattle guards shall be duly made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road.

There was no collision on the road, and the animals were not injured by any actual contact; but, being on the track of the

Lafferty et al. v. Hannibal and St. Joseph R.R. Co.

road, they were frightened by the train, and, in running, hurt themselves while jumping off the track.

There is an admission in the record that, where the accident occurred, the road was not fenced or inclosed as required by statute. In such case negligence is an inference of law, and the defendant will be held liable absolutely, without regard to that question, if the injury happened or the damage resulted in a manner contemplated by the above section.

In Indiana they have a statute on the same subject, differing somewhat in phraseology from ours, but in substance and effect identically the same. Under that statute the plaintiff brought suit for injury done to a mare. The facts were that, at the sound of the whistle on the approaching train, the mare ran on the track before the train until she came to a culvert, and then jumped so as to clear the culvert, and fell on one side of the track. In falling, the mare's left leg was broken, and she was otherwise injured. She was not touched by the locomotive or any part of the train. Upon these facts the court decided that the statute contemplated a direct injury; that the words "shall be killed or injured by the cars or locomotive, or other carriages," etc., imported the idea of actual collision, and that it would not be consistent with the intent of the act to give them such an exposition as would cover a case of consequential damages. (*The P. & C. R.R. v. Haskett*, 10 Ind. 409.)

Redfield, in the last edition of his work on railways, quotes the foregoing case as authority, and lays down the rule that the liability of a railroad, where the company has failed to fence as required by statute, does not extend to animals injured by fright. (1 Redf. on Railw. 493.) Hilliard says if a horse takes fright at the noise of a train, not caused by any unusual or unreasonable operation, the company is not liable; and to sustain this position he cites *Burton v. Philadelphia*, etc., 4 Harr. 252; *Bordentown*, etc., v. *Camden*, etc., 2 Harr. 314. These cases to which reference is made are not accessible at this place, and we have had no opportunity of examining them. The same author also refers to the case in 10 Ind. as settling the law that a statute making railroad companies liable for injuries to domestic

Lafferty et al. v. Hannibal and St. Joseph R.R. Co.

animals, whether negligent or not, does not apply to an injury from fright, where the animal is not touched. (2 Hill. Torts, 372, § 46.)

The counsel for the plaintiffs relies strongly on the case of *Moshier v. Utica & Schen. R.R. Co.* (8 Barb. 427); but that case seems to have been directly overruled in *Coy v. the same defendant* (23 Barb. 643), and neither of the cases has any particular bearing on the question we are now considering.

The statute was passed not exclusively for the benefit and protection of owners of stock who were liable to suffer loss and damage, but also as a public regulation for the safety of passengers and the traveling public, who are exposed to danger and peril in case of collision.

This court recently quoted with approbation the remark of the New York Court of Appeals in *Ernst v. Hudson River R.R. Co.* (35 N. Y. 9), on a kindred question, that the failure of a railroad company to comply with its statutory duty to give the signals at the crossing of a highway was a breach of duty to the passengers, whose safety it imperiled, as well as to the wayfarer, whom it exposed to mutilation and death. (*Rohback v. Pacific R.R.*, 43 Mo. 187.)

In construing the statute we must examine the whole object which led to its enactment. The words are that the company shall be "liable in double the amount of all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road." It seems to me plain that a direct or actual collision was contemplated; that where the agents of the road ran the locomotives or cars against any animal, and thereby injured it, or in any other manner it was hurt by actual contact or touch, then the company should be responsible for the penalty; otherwise not.

I am therefore of the opinion that the judgment of the District Court should be reversed. The other judges concur.

WM. C. FUGITT, Respondent, v. HENRY NIXON, Appellant.

1. *Bills and notes—Reasonable time, what is.*—The presentment of a draft to the drawee must be made in a reasonable time. What is a reasonable time is a question of fact, and depends upon the circumstances of the case.
2. *Bills and notes—Insolvency of maker—Want of presentment and demand.*—As between the holder of negotiable paper and the prior parties thereto, the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of presentment and demand.
3. *Bills and notes—Dishonor, notice of—Diligence, when question of law; when of fact.*—What is due diligence, in giving notice of dishonor, is a question of law when the facts are admitted. Where the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury.
4. *Bills and notes—Dishonor of—Reasonable diligence must be had in ascertaining residence of party to be notified.*—When the residence of the party to be notified of the dishonor of a bill of exchange is unknown, it is incumbent on the holder, and all other parties who are bound to give notice, to use reasonable diligence and make due inquiries as to the residence of the party so entitled to notice. What will be due and reasonable diligence in this respect must depend on the circumstances of the particular case.
5. *Bills and notes—Dishonor, notice of—Laches only imputable in giving, where residence of indorser is ascertained.*—The time employed in endeavoring to find the residence or address of the indorser must be deducted; and laches are only imputable to the holder after failure to give notice, where the residence or address is ascertained.
6. *Bills and notes—Dishonor—Notice of, where the indorser can not be found.*—In case the whereabouts of the indorser of negotiable paper can not be ascertained, if an agent is employed to give the necessary notice at the town where he is about to stop, immediately upon his arrival, this is sufficient diligence.

Appeal from Fifth District Court.

This was a suit brought on a draft for \$1200, drawn March 29, 1866, at Alleghany City, Pa., by the Alleghany Savings Bank, on Messrs. Work, McCouch & Co., payable to the order of Messrs. Baxter & Bell, indorsed by the latter to defendant, and by defendant to plaintiff. The petition alleged that the draft was transferred to plaintiff July 12, 1866, and that plaintiff transferred it for the purpose of collection to Messrs. Kemper & Paxton, from whom it passed by successive transfers to the

Fugitt v. Nixon.

Western National Bank of Philadelphia, which bank presented it for payment to the drawees on the 3d day of October, 1866. The answer put in issue the date of the transfer to plaintiff, and averred it to be the 20th day of April, 1866; and that between that date and October 3, when the draft was presented for collection, while the draft was kept out of circulation, the drawer failed, and the draft became worthless. The answer claimed that, by reason of such negligence in presenting the draft for payment, defendant was discharged. It also pleaded failure of notice of presentation and demand within a reasonable time.

Asper & Pollard, for appellants, cited *Bogg v. Keil*, 1 Mo. 743; *Davis v. Francisco*, 11 Mo. 572; *Linnville v. Welsh*, 29 Mo. 203; *Sanford v. Dillaway*, 10 Mass. 52; *Farnum v. Fowle*, 12 Mass. 89; *Granite Bank v. Ayres*, 16 Pick. 392; *Edw. on Bills*, ed. 1857, p. 486; *Jones v. Garrett*, 39 Mo. 268; *Edw. on Bills*, ed. 1857, p. 597; *Story on Prom. Notes*, § 330; *Pars. on Prom. Notes*, 506; *Ireland v. Kip*, 11 Johns. 231; *Howard v. Ives*, 1 Hill. 263; *Strahan v. Graham*, 4 Mees. & Welsby, 720; *Goupy v. Harden*, 7 Taunt. 159; *Fry v. Hill*, 2 Eng. Com. Law, 417; *Smedes v. Bank of Utica*, 20 Johns. 372; *French v. Bank of Columbia*, 4 Cranch, 141; *Edw. on Bills*, 622-4; *Pars. on Cont.* 514, 516; *Dobree v. Eastwood*, 14 Eng. Com. Law, 289; 3 C. & P. 250; *Lookwood v. Crawford*, 10 Conn. 361.

J. D. S. Cook, and *G. W. Dunn*, for respondent, cited 1 *Pars. on Bills*, etc., 516, 517, n. f; 2 Penn. St. 355; 6 *Watts & Serg.* 399; 5 *Metc.* 212; 5 *Mass.* 167; 18 *Johns.* 229; 9 *Pet.* 33, 45; *Story on Bills*, ed. 1860, § 294, n. 1; *Marsh v. Maxwell*, 2 *Campb.* 210, note; *Britain v. Johnson*, 1 *Dev.* 293; 2 *Campb.* 461; 4 *How.* 336; 2 *Pet.* 96; 7 *N. Y.* 366; *Story on Notes*, § 335, and cases cited; 1 *Barn. & Cress.* 245; 8 *Eng. Com. Law*, 105; 8 *Barn. & Cress.* 387; 15 *Eng. Com. Law*, 193; *Story on Prom. Notes*, §§ 348, 354; *Story on Bills*, § 301; 1 *Pars. on Notes*, 466, 472; *Pars. on Notes and Bills*, 339-345; 7 *Taunt.* 158, 397, 418; 3 *Carr. & Payne*, 80; 14 *Eng. Com. Law*, 462; *Field v. Nickerson*, 13 *Mass.* 131.

WAGNER, Judge, delivered the opinion of the court.

The court below very properly refused the instruction asked for by the plaintiff, that if, before the time the draft was indorsed by the defendant to the plaintiff, the drawers had become insolvent, and continued insolvent until the same was presented for payment, the finding should be for the plaintiff, without regard to the time when the demand was made.

The presentment of a draft to the drawee must be made in a reasonable time. What is a reasonable time is a question of fact, and depends upon the circumstances of the case. As between the holder of negotiable paper and the prior parties thereto, the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of presentment and demand. "The reason of the rule," said Judge Napton, "is that, notwithstanding the insolvency of the maker, some portion of the note may still be collected; and if no portion can be, at the time of demand, collected, the circumstances of the maker may undergo a change; and it is therefore the indorser's interest that his remedy over against the maker shall not be lost by the laches of the indorsee." (Davis v. Francisco, 11 Mo. 572.) To this it may be added, as an additional reason, that it is possible that the bill may still be paid by the assistance of friends or otherwise.

In the case we are now considering, the court, with all the facts before it, found that the presentment and demand was made in a reasonable time, and that payment was refused, and that the bill was regularly protested. We have no objections to make to this finding here. The principal defense, however, relied on is the insufficiency of the notice of non-payment and protest. The bill was indorsed by plaintiff to Kemper & Paxton; they indorsed it to a firm in St. Joseph, who sent it to New York, and it was indorsed to the National Bank of that city, by whom it was indorsed to the Western Bank of Philadelphia. At the request of the Western Bank it was presented by a notary, on the 3d day of October, to the drawees for payment, and payment refused, whereupon the notary protested the same, and on the same day inclosed in an envelope, addressed to the cashier of the

National Bank in New York, notices for all the drawers and indorsers of the draft.

Kemper & Paxton received the notice of the dishonor early in the same month (October); on what precise day the evidence does not show: and they mailed notice to the plaintiff before the departure of the next mail. On the same day on which the plaintiff received notice he made diligent inquiry for the post-office address of the defendant, who was then a resident of Ohio, and was unable to ascertain it, but was informed by defendant's agent in this State that defendant was then on his way to Missouri, and would arrive in a short time. Plaintiff then instructed Kemper to notify defendant of the dishonor of the draft immediately on his arrival, and that he looked to him for payment. This was done. Kemper says he gave the notice some time in the last of October; but defendant states he did not arrive till the 2d of November, being delayed a week or so longer than he expected to be in reaching the State. This date is only of importance in fixing the time in which the first notice was received. The protest was made on the 3d of October, and it seems that Kemper & Paxton had received notice thereof some two or three weeks before the arrival of the defendant. Formerly it was held that the time within which notice of dishonor must be given was a question to be passed upon by a jury, and it was only necessary that it should be sent within a reasonable time. The courts have, however, fixed the time so definitely that it is inappropriate to speak of it as reasonable.

In a case in this court it was held that what is due diligence in giving notice of dishonor is a question of law where the facts are admitted. Where the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury. (*Linville v. Welch*, 29 Mo. 203.) The evidence does not fix the exact time at which the notices were mailed in New York; but, from the fact that the notice was received by Kemper & Paxton in the early part of October, the court below found that due diligence was used; and there is nothing in that ruling that would justify the interference of this court.

The remaining question is, was defendant notified in time to

Fugitt v. Nixon.

charge him? The time of giving notice is affected by different considerations and circumstances. If the residence of the party is unknown, of course notice is an impossibility. But in such a case it is incumbent on the holder, and all other parties who are bound to give notice, to use reasonable diligence and to make due inquiries as to the actual residence of the party so entitled to notice. What will be due and reasonable diligence in this respect must depend upon the circumstances of the particular case, for no invariable or definite rule can be laid down; and what would be due and reasonable diligence in one case might fall far short in another. (Story on Prom. Notes, § 335.)

The time employed in endeavoring to find the residence or address of the indorser must necessarily be deducted; and laches are only imputable to the holder after failure to give notice, where the residence or address is ascertained. The plaintiff, on the same day on which the same was received, made application to defendant's agent in this State, and also inquired of his acquaintances, as to defendant's residence in the State of Ohio. He did not learn from any of them either the place of his residence or his post-office address. But from all he received the same uniform answer: that defendant was moving to this State—was probably on his way out—and would arrive in a short time. Being unsuccessful in his inquiries, he then did all that remained for him to do—he employed a person to give the necessary notice at the town where the defendant would stop, immediately on his arrival. I am at a loss to perceive how he could have exercised greater diligence or take any other course. He used that reasonable diligence and made the due inquiries which the law required of him.

I think the judgment is right, and should be affirmed. The other judges concur.

 May et al. v. Kloss.

MAY, WEIL & Co., Plaintiffs in Error, v. FRANCIS KLOSS, Defendant in Error.

1. *Practice, Civil—Account, balance of, when treated as an account stated.*—Where defendant acknowledged his indebtedness for a specific sum, being a balance of an account, the court was at liberty to treat it as an account stated, and properly gave judgment for such balance, although the account was not itemized. And where appeal is taken by reason of such objection to an account, this court will award ten per cent. damages against appellant.

Error to Fifth District Court.

S. E. Carter, for plaintiffs in error.

Grubb, and Strong & Chandler, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs commenced a suit against defendant before a justice of the peace of St. Joseph, and filed the following paper as a statement of his claim :

ST. JOSEPH, Mo., ———, 1866.

Mr. FRANCIS KLOSS to REITER, STEIL & Co., Dr.

To merchandise.....	\$99 25
By credit.....	9 25

Balance due.....	\$90 00
------------------	---------

October 2, 1866.

Please pay above account to Messrs. D. A. Millington & Co., or order, and accept this for your receipt.

REITER, STEIL & Co.

[Indorsed.] Pay to the order of Messrs. May, Weil & Co.

D. A. MILLINGTON & Co.

Judgment was entered for plaintiff upon the only defense made, "that the plaintiff had no right to sell goods in St. Joseph," and defendant appealed. In the Circuit Court the case was tried by the judge sitting as a jury, and judgment affirmed. At the trial testimony was offered to show that the defendant, when the statement and orders were presented and read to him, admitted them to be correct, and that he owed the balance stated. After the evidence closed, the judge made the following declara-

May et al v. Kloss.

tion of law, to which defendant excepted: "Plaintiffs ask the court to declare the law to be that if the court, sitting as a jury, believes that the plaintiffs presented the account sued on to defendant for payment, and, after having showed and read to him the assignments made thereon, defendant admitted it to be correct, the plaintiffs can recover a judgment on the same as on an account stated, without being itemized, and should be so rendered for the plaintiff."

We have no fault to find with this declaration of law. If the defendant acknowledged his indebtedness for a specific sum, being a balance of an account, the court was at liberty to treat it as an account stated, and did right in giving judgment for such balance. No objection whatever was made before the justice to the character of the paper filed—no complaint of being misled by it—but only an objection to the right of those with whom he made the account to sell him the goods. For the first time, in the Circuit Court, he raises this very slim technical question, when too late to remedy the omission, if one was had.

A similar question was raised in *Busch, etc., v. Deipenbrock* (20 Mo. 570), one item of an account filed being "\$97.90, being balance of account from 1851." The cause had been dismissed because of the generality of this item, and the court decided it to have been no sufficient ground for dismissal; and Judge Ryland makes some very pertinent remarks upon the attention given in the lower courts to such mere technical and formal questions. This is simply a collection case, and the defense has no merits.

The judgment of the District Court is reversed, and that of the Circuit Court affirmed, with ten per cent. damages. The other judges concur.

ELMORE WATERS, Defendant in Error, v. WM. W. BROWN, Plaintiff in Error.

1. *Damages—Setting fire to prairie—Premises left uninclosed by—Measure of damages.*—In an action under the statute (Gen. Stat. 1865, ch. 81, p. 386) for damages to plaintiff's premises, caused by the willful firing by defendant of a prairie, the court erred in telling the jury to find for the plaintiff, among other things, "the value of the premises thrown out for one season." Plaintiff can charge defendant only for such damages as, by reasonable endeavors and expense, he could not prevent. In such case the rule for assessing damages would be the value of his rails lost and destroyed by the fire, and the loss of the use of the land during the time that was reasonably necessary to procure other rails and rebuild the fence. If he could have rebuilt the fence in time to secure a crop for that year, he could not hold defendant liable for the failure of crop. Whether he was guilty of negligence, or could have restored the fence within any given time by the use of reasonable means, was exclusively for the consideration of the jury.

Error to Fifth District Court.

Hall & Oliver, for plaintiff in error.

I. Whether plaintiff was guilty of negligence in not refencing the land, was a question of fact for the jury to determine. (18 Mo. 365; 14 U. S. Dig. 150, § 2; 12 Metc. 415; 7 Greenl. 42.)

II. There was no evidence that the land was necessarily burned out in consequence of the fire. For all that appears in the evidence, the plaintiff made no effort to refence it. It was not sufficient for plaintiff to prove that his rails were burnt by the act of defendant, but the burden of proof was on him to show that his land lay idle in consequence of said burning, without any negligence on his part. (1 Hill. on Torts, 124.)

Asper & Pollard, and *Hoskinson*, for defendant in error, cited *Newman v. Lawless*, 6 Mo. 301; *Finney & Finney v. Allen*, 7 Mo. 416; *Vaulx v. Campbell*, 8 Mo. 224, 707; *Maston v. Fanning*, 9 Mo. 302; *Chouteau v. Uhrig*, 10 Mo. 62; *Walter v. Cathcart*, 18 Mo. 256; 28 Mo. 360.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff for damages sustained by him in consequence of the willful firing, by defendant, of a prairie in Caldwell county, in violation of the statute of this State. Plaintiff claimed damages for 6,400 rails burnt up, forty young peach trees which were destroyed, and also for being deprived of the use of sixty-five acres of land under cultivation during the year 1864 and subsequent thereto. On the trial, the court, of its own motion, gave the following instruction: "If the jury find for plaintiff, they will assess the damages at the value of the peach trees destroyed by the fire, the value of the use of the premises thrown out for one season, and the amount of money it would require to replace the rails in the fence as they were before destroyed by fire."

This instruction was objected to by defendant, but his objection was overruled. The plaintiff had judgment in the Circuit Court, which was affirmed by the District Court, and the cause is now brought here for review on writ of error.

It requires no argument to show that a portion of the instruction asserts a wrong proposition of law. The court committed manifest error in telling the jury that they should find for the plaintiff "the value of the use of the premises thrown out for one season." Whether the plaintiff was damnified to that extent was a question of fact to be determined by the jury from the evidence before them, and not a matter to be passed upon by the court. The measure of damages in such a case will depend on circumstances. If a party can, by a trifling expense or by reasonable exertions, avert the damages caused by the wrongful act of another, it is his duty to do so; and if he fails in performing the full measure of his duty in this regard, he will be only entitled to recover such damages as were not the result of his negligence or omission. He can charge the delinquent party only for such damages as, by reasonable endeavors and expense, he could not prevent. (*Douglass v. Stephens*, 18 Mo. 362.) When the plaintiff's rails were burned and his lands left uninclosed, in consequence of fire set out by the defendant, the rule for assess-

Waters v. Brown.

ing his damages would be the value of his rails so lost and destroyed, and the loss of the use of the land during the time that was reasonably necessary to procure other rails and rebuild the fence.

The fire is alleged to have taken place on the third of March; and if, by reasonable and proper exertions, the plaintiff could have had the fence rebuilt in time to secure a crop for that year, he was bound to do so, and he can not hold the defendant liable for his own neglect. Whether the plaintiff was guilty of negligence, or could have had the fence restored within any given time, by the use of reasonable means, so as to have diminished the damages, was a question peculiarly and exclusively for the consideration of the jury. It was outside of the scope and authority of the court to arbitrarily declare, as a principle of law, that the plaintiff was entitled to damages for the use of his land during the whole season, and exclude altogether from their minds the qualifications above indicated.

But it is contended that, although the instruction may be wrong, still the plaintiff was not injured by it, as the jury might have found damages for even a longer time than one season, and therefore the judgment should be affirmed. It is true this court has on several occasions laid down the rule that a judgment will not be reversed where no evil results from the giving of an instruction, although, strictly, it may be improper. But, to justify such a ruling, it must be apparent that not only has justice been done, but that the jury could have arrived at no other conclusion.

It seems to be admitted in this case that the plaintiff is entitled to judgment, and the amount is the whole matter in dispute. The action sounds purely in damages, and the plaintiff will be entitled to recover whatever amount of damages he may show has been sustained, and which he could not avert by reasonable exertions. The jury are the proper and appropriate judges to affix and determine the damages, upon a consideration of all the testimony. We can not say that the defendant has suffered no injury on account of the instruction given by the court. The evidence will not justify us in declaring that the result must necessarily have been the same without the instruction. Such

The State of Missouri ex rel. Midgett et al. v. Matson, Adm'r, et al.

being the case, I am in favor of reversing the judgment and remanding the cause for a new trial in accordance with the views herein expressed.

Reversed and remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* WILLIAM MIDGETT *et al.*,
Defendants in Error, *v.* RODERICK MATSON, Adm'r, etc.,
et al., Plaintiffs in Error.

1. *Administrator, bond of—Suit on may be brought against, prior to order of distribution, when.*—The heirs may institute proceedings against an administrator for a breach of his bond prior to an order of distribution by the Probate or County Court, whenever it is ascertained that the debts of the estate have been paid. In such case the heirs have a direct vested legal interest, and ought not to be prejudiced by the default of the administrator, or the remissness of the court in discharging its proper functions.
2. *Administrator—Final settlement of, lapse of time after—What presumption afforded by as to unsatisfied claims.*—The lapse of eight years after a final settlement by an administrator leads inevitably to the inference that there were then no creditors holding unsatisfied claims against the estate.
3. *Sureties—Release of, at law and in equity.*—At law, a technical release of one surety is a release of all; but the rule is otherwise in equity.
4. *Principal and surety—Co-sureties—Discharge of one no discharge of the others in equity.*—A release of the principal will always discharge the surety; but one surety may be discharged without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. The discharge of one surety can not be permitted to increase the liability of the others.

Error to Fifth District Court.

Benson was principal, and Campbell and Mills were securities on his bond as administrator. This suit was brought by plaintiffs, as heirs, against Matson, as administrator of Benson, and Mills and the heirs of Campbell, for breach of the administration bond, by reason of the failure of Benson to account for moneys in his hands. The suit was commenced eight years after Benson's final settlement. (*Vide*, also, opinion of the court.)

The State of Missouri ex rel. Midgett et al. v. Matson, Adm'r, et al.

McFerran & Turner, for plaintiffs in error.

The defendants in error, by dismissing their suit against the Campbell heirs, after demurrer sustained as to them, thereby released the co-security (Mills) from the obligations of the bond. (18 Johns. 481; 7 Marsh. 67; 25 Wend. 320; 21 Wend. 108; 8 Paige, 237, and cases cited; 4 Wend. 368; 9 Cow. 128.)

Asper & Pollard, for defendants in error.

I. The release of one of several co-obligors does not discharge the others. (State, to use, etc., v. Atherton, 40 Mo. 209; Dodd v. Wynn, 27 Mo. 501.)

II. In this case it is fair to assume that the estate was fully settled; but if any creditors should still exist, the suit could be maintained nevertheless, because the law provides that the heir in such case can be made to refund. (State, to use, etc., v. Campbell, 10 Mo. 724; Finney *et al.* v. State, to use, etc., 9 Mo. 624; State, to use, etc., v. Porter, *id.* 352; State v. Morton, 18 Mo. 53.)

WAGNER, Judge, delivered the opinion of the court.

The pleadings in this case are somewhat confused and artificially drawn; but the real merits of the controversy are involved in two points, which need only be noticed. These are: first, whether the heirs could prosecute the suit on the administrator's bond before order of distribution made by the County Court; and, second, whether the release of Campbell's heirs, whose ancestor was one of the sureties on the administration bond, operated as a release of Mills, who was the co-security. There is some conflict in the previous decisions of this court in regard to the right of the heirs to institute proceedings against an administrator for breach of his bond prior to an order of distribution by the appropriate tribunal. In the case of *The State, to use, etc., v. Campbell et al.* (10 Mo. 724), it was held that an heir or distributee might sue for a failure to account for money received, and that their right of action accrued as soon as the failure occurred. The court there took the broad ground that it

The State of Missouri ex rel. Midgett et al. v. Matson, Adm'r, et al.

was a matter of utter indifference whether three years had elapsed from the grant of letters of administration, or whether there had been any final settlement or order of distribution made; that the injury accrued as soon as the neglect occurred, irrespective of time. It was said, if the heirs and distributees should recover from an administrator moneys or property not accounted for, if creditors should afterward appear, they could, by bill in equity, compel them to refund. With great deference to the eminent jurist who delivered that opinion, the reasoning is not quite satisfactory. Suppose the heirs have coerced the money out of the hands of the administrator, and have squandered it, or become wholly insolvent, where then is the creditors' recourse? Heirs are postponed to creditors, and they have no rights till the debts are paid; but if they can obtain the property in this way, before final settlement and without discharging the debts, where is the creditors' security? The administrator is responsible on his bond; and this was intended for the joint protection of the heirs, the creditors, and all who may have any interest in the estate.

The case of *The State v. Campbell* was followed in *State v. Morton* (18 Mo. 53), without any comment whatever, the judge merely remarking that the point about the order to pay over before the action could be brought had heretofore been decided by this court, and would remain undisturbed.

In *The State v. Fulton* (35 Mo. 323), it was said that, although the debts be paid, the heirs have no right of action until distribution is ordered. In the case of *Vastine v. Dinan* (42 Mo. 269), it was held that where the administration was not completed, and the debts paid up, an action would not lie in behalf of the heirs; that their rights must be ascertained and determined before they could sue. It will be thus seen that there is some conflict in the prior rulings of this court, and that the decisions are not entirely harmonious. I am inclined to think that the better opinion is that an order of distribution by the Probate Court is not absolutely necessary as a prerequisite to enable the heirs to maintain their action. But whenever it is ascertained that the debts have been paid, they are entitled to proceed against the administrator for his failure to account or for breach committed by him.

The State of Missouri ex rel. Midgett et al. v. Matson, Adm'r, et al.

When the debts are all proved up and paid, the heirs then have a direct vested legal interest; and they ought not to be prejudiced by the default of the administrator, or the remissness of the court in discharging its proper functions.

In the present case the petition states that the administrator made his third and last settlement, and that the balance sued for was found to be in his hands. It is not averred, as it should have been, that the settlement was final, nor that the debts were all paid. The petition is defective in this matter, but it can be remedied hereafter. The length of time that elapsed after the making of the settlement, and before this suit was brought—eight years—leads inevitably to the inference that there were no creditors holding unsatisfied claims; and it shows, also, the necessity of allowing the action to be maintained in a proper case without compelling a resort to the expensive process of appointing an administrator *de bonis non*.

This brings us to the consideration of the second question, namely, whether the release of Campbell's heirs released Mills from his obligation on the bond. The bond was for the sum of five hundred dollars, and was signed by Campbell and Mills as sureties. The suit was instituted against Matson, as administrator of the principal in the bond, and Mills and the heirs of Campbell, deceased. Campbell's heirs filed a demurrer to the petition, which was sustained by the court on the ground that they were not liable. Whether the court decided rightfully or wrongfully is not before us for review. It is certain that the judgment on the demurrer has the effect of absolving them from liability. After the decision on the demurrer, the suit was dismissed as to Campbell's heirs, the petition was amended, and the proceedings conducted against Matson and Mills, an assessment of damages had, and judgment rendered for the amount of the penalty on the bond. There is an allegation of total insolvency as to Matson in his representative capacity, which is not denied; and if the judgment is permitted to stand, Mills will be compelled to pay the whole amount. At law, a technical release of one party is a release of all; but the rule is otherwise in equity. A release of the principal will always discharge the surety; but one surety may be discharged

Terrell et al, v. Andrew County.

without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. The discharge of one surety can not be permitted to increase the liability of the others. In cases of joint suretyship, each surety is only bound for a ratable share of the debt. (Routon v. Lacy, 17 Mo. 399; Dodd v. Winn, 27 Mo. 501.) Now Mills' contract only made him liable for half the penalty expressed in the bond, and that liability can not be increased. Had Campbell in his lifetime been sued jointly with him, and had he paid the whole amount, he would have had his remedy against Campbell for contribution. But, by the release, the right of contribution is gone, and it would be unjust to allow Mills to be prejudiced thereby. The judgment against him, by which he is liable to pay the whole amount, is, I think, erroneous. He only contracted to pay one-half, and his undertaking is the full measure of the obligation.

The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion. The other judges concur.

WARREN F. TERRELL and JOHN TERRELL, Plaintiffs in Error, v.
ANDREW COUNTY, Defendant in Error.

1. *Evidence — County records — Notice imparted by — Clerical error.*—Under section 41, p. 364, R. C. 1855 (Gen. Stat. 1865, ch. 109, § 25), notice of the contents of instruments is held to be imparted, after filing, only where the contents are correctly spread on the record, and not otherwise. The act was never designed to impose on the purchaser the burden of entering into a long and laborious search into the original papers to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests upon the party holding the title. If his duty is imperfectly performed, he must suffer the consequences, and not an innocent purchaser.

Error to Fifth District Court.

Vories & Vories, for plaintiffs in error.

1. Plaintiffs in error were only chargeable with notice of the mortgage to the extent of \$200. (Lessee of Jennings v. Wood,

Terrell et al. v. Andrew County.

20 Ohio, 261; 1 U. S. Dig. 158, § 107; 1 Sup. U. S. Dig. 534, § 355; 2 U. S. Dig. 37, § 263; 8 Verm. 172.)

II. The recorder failed to record correctly the mortgage to the defendant, and not the mortgage to Terrell; and if an injury resulted thereby, the defendant was the party damnified, and should sue the recorder. (See above authorities.)

III. The effect of filing deeds is to give notice of what is put upon the record, and the statute merely fixes the time at which this notice shall commence.

Strong & Chandler, for defendants in error.

I. Plaintiffs had notice in law of the existence and amount secured by mortgage of Holt to Andrew county. (R. C. 1855, p. 364, § 41; Watts, 57; 24 Pick. 274; 2 Greenl. Cruise, 553-8; 2 Am. Law Reg. 4-11.) Equity presumes a mortgage to have been recorded properly. (1 Sto. Eq. § 64, g; 12 Ohio, 532.)

II. A deed is recorded in contemplation of law when filed for record. (R. C. 1855, p. 364, § 41; 10 Ala. 368; 1 Greenl. Cruise, 546; Beverly v. Ellis, 1 Rand. 102.) All subsequent purchasers and mortgagors shall be deemed, in law and equity, to purchase with notice. (R. C. 1855, p. 364, § 41; 9 Mo. 323-6; 14 Mo. 175.)

WAGNER, Judge, delivered the opinion of the court.

The argument in reference to the execution of the power contained in the mortgage, and the frauds between the Terrells in the purchase of the property at the mortgagee's sale, is beside and irrelevant to any issue in the case. If the facts alleged are true, they may have furnished sufficient reason for Holt, the mortgagor, to move to set aside the sale; but in the absence of any complaint on his part, the defendant can not make the objection for him. There is but one question in this case to be determined. It seems that Andrew county loaned to one Holt the sum of four hundred dollars belonging to the common-school fund, for the securing of which he gave personal security, and also executed a mortgage on a lot owned by him in the city of Savannah. The county duly deposited the deed for record with the recorder of the county, and

Terrell et al. v. Andrew County.

that officer, in recording the same, by mistake inserted two hundred dollars in the record instead of four hundred dollars, showing an encumbrance for the former instead of the latter sum. After the mortgage was recorded, Holt applied to one of the plaintiffs for a loan of money, and offered to secure him by mortgage liens on real estate, the lot mortgaged to the county being among the property. On examination, the record showed a mortgage for two hundred dollars; the money was loaned, and a junior mortgage given subject to the prior lien. Subsequently the county ordered the lot sold in default of payment, claiming the full amount of four hundred dollars, together with accrued interest. The plaintiff paid the two hundred dollars, with interest thereon, and proceeded to enjoin the collection of the remainder.

The Court of Common Pleas in Buchanan county, to which the cause was removed by change of venue, rendered judgment of perpetual injunction, and this judgment was reversed in the District Court.

The only question, therefore, is whether, under the law, the record imparted notice for any greater amount than two hundred dollars. It is not pretended that, at the time Terrell loaned the money and took his mortgage, he had any other notice of the county's claim than that disclosed by the record.

It is contended here on behalf of the county that, according to our statute, when a person files with the recorder an instrument, it imparts notice of its real contents to all subsequent purchasers, regardless of any mistake that the recorder may commit in placing it on record; that the statute provides that every instrument in writing, certified and recorded in the manner prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice. (R. C. 1855, p. 364, § 41.)

According to the literal interpretation of the section, no notice is imparted till the instrument is actually placed on record, and then it relates back to the time of filing. It was, no doubt, the intention of the Legislature to give a person filing an instrument or conveyance all the benefit of his diligence; and when he deposits

Terrell et al. v. Andrew County.

the same with the recorder, and has it placed on file, he has done all that he can do, and has complied with the requirement of the law. From that time it will give full notice to all subsequent purchasers and encumbrancers.

A person, in the examination of titles, first searches the records; and if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unencumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the recorder's office for the inspection of the public. After they are recorded, they take them out and keep them in their possession. In a large majority of cases it would not only entail expense and trouble, but it would be useless, to attempt to get access to the original papers.

Hard and uncertain would be the fate of subsequent purchasers if they could not rely upon the records, but must be under the necessity, before they act, of tracing up the original deed to see that it is correctly recorded. The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests on the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he can not claim all the advantages and lay the fault at the door of an innocent purchaser.

But it is said the recorder is required to give bond for the faithful performance of all the duties enjoined on him by law, and that this is for the benefit of the subsequent purchaser who is injured by his dereliction, and that he must pursue his remedy against the recorder. This bond is for the benefit of any and every

Murphy v. Wilson et al.

person who may suffer injury by reason of the recorder's neglect to faithfully discharge the duties of his office. It was not Terrell, in this case, who was injured; it was Andrew county. The county deposited the deeds with the recorder, and paid him for recording it. Through his negligence and inattention he did his work inaccurately, so that it imparted notice for only half the consideration, and the county suffered loss and injury in consequence thereof. The privity springs and exists between the county and the recorder, and the county is the proper party to proceed against him to recover the loss.

The judgment of the District Court must be reversed. The other judges concur.

ISAAC T. MURPHY, Plaintiff in Error, v. PERRY K. WILSON
et al., Defendants in Error.

1. *Practice, Civil—Actions—Trespass—Shooting, injuries caused by—Participants all liable for.*—Where a number of persons met at the same time, and, by mutual understanding, arranged themselves on different sides, and engaged in combat with pistols, and a passer-by was wounded by one of the shots fired, they were held jointly and severally liable to the injured person in an action of trespass; and it was immaterial whether the defendants in the action fired the shot, or whether it was fired by some one else participating in the fray.
2. *Practice, Civil—Actions—Trespass—Affray—Shooting—Allegata and probata.*—In an action of trespass for injuries done plaintiff by shooting, where the averments of the petition were that one of the defendants did the shooting, but all the defendants, together with others, made the assault, and engaged in the commission of the offense, testimony was proper and sufficient to sustain the action if it showed that plaintiff was shot by one of those participating in the affray, although not by one of those named as defendants.

Error to Fifth District Court.

Hall & Oliver, for plaintiff in error.

I. The plaintiff, in his instruction, sought to recover on a case not set up in his petition. The case made in plaintiff's pleadings and that made in his instructions are totally different. The one charges defendant, and those acting in concert with him, with

Murphy v. Wilson et al.

injuring plaintiff; the other seeks to recover for an injury committed by those acting against defendant, and actually trying to kill and murder him. (1 Van Sand. Pl. 249; Harris v. Han. & St. Jo. R.R., 37 Mo. 308-9.)

II. A defendant is liable for the acts of others only when they act in concert with him, or under and by his authority; and not when they act in self-defense, for the purpose of protecting themselves from the acts of defendant. (1 Chit. Pl. 117; 4 Dana, 464; 11 Allen, 514; 2 Seld. 405; 2 Hill. on Torts, 297, § 10.)

McFerran & Vories, for defendants in error.

I. Defendants were all liable, without regard to who fired the shot that wounded the plaintiff. (Johnson v. Tompkins, 1 Bald. 571; 2 Abb. Nat. Dig. 521, § 3; 1 Cush. 453; 19 Johns. 381, cited in 3 Phil. on Ev. 51, n. 1088; 2 Hill. on Torts, 309-11, § 9 *et seq.*; 2 Greenl. Ev. 579, § 621; 19 Mo. 421; 22 Mo. 373; 27 Mo. 28; Sedg. on Dam. 82-3; 21 Mo. 492; 38 Mo. 270; 1 Chit. Pl. 426; 2 Hill. on Torts, 316; 6 Duer, 382; 9 U. S. Dig. 414, § 15; 1 Van Sand. Pl. 64-5; 41 Mo. 484; 11 Johns. 285; 9 Johns. 294; 4 Den. 464; 2 Hill. on Torts, 315; 10 B. Monr. 422; 1 Hill. on Torts, 61-78, 90, 97; Steph. Nisi Prius, 210-11.)

II. All persons who wrongfully contribute in any manner to the commission of a trespass are responsible as principals, and each is liable to the extent of the injury done. (41 Mo. 484; 2 Abb. Nat. Dig. 521, § 3.)

III. The plaintiffs in error were rioters, and formed a part of a riotous and unlawful assemblage, and, as such, are liable for the act of such assemblage. (Gen. Stat. 1866, § 17, p. 812; 2 Whart. Crim. Law, §§ 2472, 2483; Whart. Am. Law of Homicide, 353.)

IV. Where persons are engaged in a reckless or unlawful act, it makes no difference that an injury was not intended to a third person. (2 Steph. Nisi Prius, 1004, 1006; 22 Mo. 379; 38 Mo. 27; 10 Wend. 654.)

WAGNER, Judge, delivered the opinion of the court.

The petition in this case states that on or about the 29th day of August, 1866, in the county of Caldwell, in the State of Missouri, and in a public street in the town of Breckenridge, the defendants, the Wilsons, together with Reese Tunks, Daniel Stubblefield, Henry Turpin, and others, unlawfully and without leave, and wrongfully, made an assault on the plaintiff; and that Perry K. Wilson, one of the defendants, then and there shot and discharged a pistol loaded with powder and leaden bullets at and against the said plaintiff, and thereby, then and there, with the leaden bullet, struck and wounded the plaintiff; that Humphrey Wilson, Levi Watson, Reese Tunks, Daniel Stubblefield, and Henry Turpin, and other persons unknown to plaintiff, were, at the time of said shooting, present, aiding, abetting, comforting, assisting, and maintaining the said Perry K. in shooting and wounding the plaintiff.

The answer of the defendants denied all the material allegations set out in the petition. The evidence, in substance, shows that a difficulty occurred in the town of Breckenridge at the time mentioned in the petition, between the defendants, the Wilsons, with some others, on one side, and Tunks, Stubblefield, and others, on the other side. There were two engagements, and the parties fought with pistols. In the first encounter the Wilsons drove off their opponents. They then formed in a line across the public street, flourished their pistols, abused the opposite party, and dared them to a renewal of the combat. The other side then rallied, and another fight ensued, which was kept up for several minutes, during which sixty or seventy shots were fired; and in the last contest the plaintiff, whilst peaceably walking along the street, taking no part in the difficulty, was shot and dangerously wounded. The evidence does not disclose, with any certainty, by which side the shot was fired that hit him.

Upon the trial in the Circuit Court the plaintiff asked an instruction, in effect that if the jury believed that at the time mentioned the defendants, or either of them, assaulted Tunks, Stubblefield, and others; and if, from the situation of the street,

Murphy v. Wilson et al.

the number of persons, or other cause, said assault and firing of pistols was of such a character as to endanger or expose to injury persons passing on the street, and the plaintiff was wounded while passing on the street, without any fault on his part; and if the defendants aided and abetted each other in said assault or assaults and firing of pistols, they are all liable, provided the shot that wounded the plaintiff was then and there fired by the defendants, or by some person or persons aiding and abetting the defendants, *or returning the fire of defendants, or the fire of those aiding and abetting the defendants*, although the wounding of the plaintiff may have been accidental, and not intended by the defendants or either of them, or persons aiding them or returning their fire—they should then find for the plaintiff.

This instruction the court modified by striking out the words italicized, and then gave it. To which action of the court the plaintiff excepted. At the request of the defendants, the court instructed that unless the jury found from the evidence that the defendants, or some one of them, or some other person who was present, with whom defendants were acting in concert, aiding and assisting, shot the plaintiff, they must find for the defendants.

The court further instructed the jury that if they believed from the evidence that the plaintiff was shot by some person engaged in hostile combat against the defendants, and trying to shoot them, or some one of them, they must find for the defendants. To these instructions the plaintiff objected; and, upon his objections being overruled, he took a non-suit, with leave to move to set the same aside; and after an unsuccessful motion to have the same set aside, the cause was removed to the District Court, where the judgment was reversed, and the defendants brought error to this court.

It is contended by the learned counsel for the defendants (plaintiffs in error in this court) that the action of the Circuit Court in striking out that part of the plaintiff's instruction hereinbefore referred to was right, because it sought to recover on a cause of action not made by the pleadings.

This court has heretofore decided that a party can not declare upon one cause of action, and recover judgment upon another

and entirely different cause. Notwithstanding the exceeding liberality of the practice act, we do not think it was intended to apply to such a radical and complete change. When the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment, without costs. (Gen. Stat. 1865, ch. 168, § 2.)

By section 1 of chapter 168, it is declared that no variance between the allegation in the pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon its merits. Now, the averment in the petition is that the defendants, together with Tunks, Stubblefield, and others, made the assault, and were all engaged in the commission of the offense, though it is alleged that Perry K. Wilson did the shooting.

It is unquestionably a rule of good pleading, under the code, that "every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every such averment must be understood as meaning what it says, and, consequently, is one to be sustained by evidence which corresponds with its meaning."

Whether the pleading in this case can be considered good, will depend greatly on the liability of the defendants. If, as counsel for defendants contend, they can only be held liable for their own immediate acts, or the acts of those who acted in concert with them, then the case does not correspond with the averments in the petition. If, however, the position of the plaintiff's counsel be tenable—that the defendants are the instigators and active promoters of the riot, and that they are therefore responsible for all injury that occurred by the act of any of the participants therein—the petition contains a sufficient allegation, and must be held good.

In general, it may be laid down as a correct proposition that every person is liable for the direct, natural, and probable consequence of his own act. If a person puts in motion a dangerous thing, as letting loose a dangerous animal, and leave to hazard

Murphy v. Wilson et al.

what may happen, and mischief ensues, he will be regarded as a trespasser, and held answerable. Every one doing an unlawful act is considered as the doer of all that follows. If two persons mutually engage in mortal combat, or fight a duel in the public streets, and a passer-by is hit, though unintentionally, both will be held guilty as principals. As showing the settled law on the subject, where it is sought to charge an individual for the acts of others, it will be well to refer to a few of the more prominent cases.

The case of *Scott v. Sheppard* (2 W. Black, 892; 3 Wils. 403; S. C. in Sm. Lead. Cas.) is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Sheppard threw a lighted squib composed of gunpowder into a market-house, where a large concourse of people were assembled. It fell upon the standing of Yates, and, to prevent injury, it was thrown off his standing across the market, when it fell upon the standing of Willis; from thence, to save the goods of the owner, it was thrown to another part of the market-house; and Ryall, to avert danger, again gave it motion and new direction, and, in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided by the court that Sheppard was answerable in an action of trespass and assault and battery. Dr. Grey, C. J., held that throwing the squib was an unlawful act, and that, whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act.

In *Vandenburgh v. Truax* (4 Den. 464), the defendant having had a quarrel with a boy in the street in a city, took up a pick-axe and followed him into the plaintiff's store, whither he fled; and, in endeavoring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted. It was held that the defendant was liable to the plaintiff for damages; that where one does an illegal or mischievous act, which is likely to prove injurious to others, he is answerable for the consequences which may directly and naturally result

Murphy v. Wilson et al.

from his conduct, though he did not intend to do the particular injury which followed.

The case of *Guille v. Swan* (19 Johns. 381) was this: Swan sued Guille in a justice's court, in an action of trespass, for entering his close and treading his roots, vegetables, etc., in a garden in the city of New York. The facts were that Guille ascended in a balloon in the vicinity of Swan's garden, and descended in his garden. When he descended his body was hanging out of the car of the balloon in a very perilous situation, and he called a person at work in Swan's field to help him, in a voice audible to the pursuing crowd. After the balloon descended it dragged along over potatoes and radishes, over thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden, through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille with his balloon was about fifteen dollars, but the crowd did much more. The plaintiff's damages in all amounted to ninety dollars. It was contended before the justice that Guille was answerable only for the damages done by himself, and not for the damages done by the crowd. The justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury accordingly found a verdict for him for ninety dollars, on which the judgment was given, and for costs. On error in the Supreme Court, it was argued by the counsel for the plaintiff in error that the injury committed by Guille was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of interest; and that, upon the same principle that would render Guille answerable for the acts of the crowd in treading down and destroying the vegetables and flowers of Swan, he would be responsible for a battery or a murder committed on the owner of the premises. But the court, by Ch. J. Spencer, said: "The intent with which an act is done is by no means the test of the liability of a party to an action for trespass. If the act cause the immediate injury, whether it was intentional or unintentional,

Murphy v. Wilson et al.

trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in *Percival v. Hickey* (18 Johns. 254). Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear that they either acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others." And it was accordingly adjudged that Guille was answerable for the acts of the crowd, and the judgment of the justice was affirmed.

In the case of *Thomas v. Winchester* (2 Seld. 397) it was declared that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. The liability of the dealer in such cases arises not out of any contract or direct privity between him and the person so injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reached the hands of the persons injured.

It will be seen in the foregoing cases that the injuries received by the plaintiffs were not the necessary consequences of the wrongs done by the defendants. But in every instance the wrong was of such a nature that it might very naturally result in an injury to some other person.

In the case of *Vasburgh v. Moak and others* (1 Cush. 453), the plaintiff was driving with a one-horse wagon along a public highway, where the defendants and others were playing a game of wicket; and, while so passing, the plaintiff was struck in the pit of the stomach and much injured by the ball which the players were using. At the time of the accident, Hollenback, one of the defendants, whose part in the game was to catch the ball after it had been struck, and to throw it back to the person whose busi-

Murphy v. Wilson et al.

ness it was to roll it, was stationed in a northeasterly direction from the latter, whose station was at one of the wickets. The plaintiff had passed the wicket a little, and was west of a direct line from Hollenback to the person at the wicket. At this moment Hollenback threw the ball, with an intention to throw it to the person at the wicket; but the ball being wet, it slipped in his hand when he was in the act of throwing it, and was then turned from its intended direction, and struck the plaintiff as already stated. The other defendants were engaged in the game with Hollenback, but they had no other connection with him in the act of throwing the ball.

The defendants requested the court to instruct the jury that if they should be satisfied that Hollenback designed to throw the ball to one of the other players; that it was thrown with such design, and slipped in his hand; that, by accident on his part, he hit the plaintiff; and that the other defendants had nothing to do with the throwing of the ball in this particular instance, although engaged in the general play—then such other defendants would not be responsible for the injury occasioned by the accident.

This instruction was refused, the court holding that if several persons engaged in playing a game of ball in the public highway, and a traveler lawfully passing thereon was accidentally struck by the ball, all persons so engaged were liable in trespass, provided that, from the width of the road, and the number of persons usually passing thereon for the ordinary purposes of travel, the game was of such a character as to be likely to endanger the safety of travelers and passengers, and that the individual by whom the ball was thrown was acting in the usual manner of persons engaged in such game.

Here it will be seen that the doctrine is laid down that there was an association of persons engaged in a common object, and that an injury inflicted by one individual without the intentional concurrence on the part of the others, or even without intention on the part of the individual who inflicted the injury, rendered the whole number engaged jointly liable for the damages sustained by the injured party. They engaged in playing a game of ball on a public highway, where travelers were accustomed to pass and

Murphy v. Wilson et al.

had a lawful right to pass ; and the happening of the event which caused the injury was a contingency which was one of the probable and natural results of their acts.

In the present case the parties were all engaged in violating the law and disturbing the public peace. They showed an utter disregard for the safety of the community and the lives of individuals. In the most public place of a street in a town, where people were passing by, they engaged in an open fight, firing their pistols in every direction. All the participants were guilty, and all responsible for whatever damages flowed from their outrageous acts. The evidence is very clear that defendants induced, brought on, and caused the last encounter, during which the plaintiff was injured ; and the wounding of innocent persons on the streets, where sixty or seventy pistol shots were fired by men wrought up to the highest pitch of excitement, was nothing but a probable and natural consequence. But had the defendants not been the aggressors, so far as responsibility is concerned, the case would in no wise be altered. Had the parties all met at the same time, and, by mutual understanding, arranged themselves on different sides, and engaged in conflict, they would have all been jointly and severally liable for all damages that occurred.

It was not material whether the defendants in this action fired the shot that did the mischief, or whether it was fired by some one else participating in the desperate fight. They were all alike amenable, and might be sued either jointly or separately. On either ground—that individuals are liable for the acts of others when those acts are produced by them ; or that, when injury results from mutual combat or association, all are principals, and all are liable—I think the action is maintainable, and that the judgment of the District Court should be affirmed.

Affirmed. The other judges concur.

SAMUEL J. LESEM *et al.*, Appellants, *v.* HERRIFORD & LOWRY;
R. J. HOLLY, Interpleader, etc., Respondent.

1. *Fraudulent conveyances—Statute concerning—Sale—Change of possession, what constitutes—Clerk—Vendee of vendee.*—Under section 10, ch. 67, R. C. 1855 (*vide* also, Gen. Stat. 1865, p. 440, § 10), the vendee must take the actual possession; and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the vendor, that the goods have changed hands; and that the title has passed out of the seller into the purchaser. (*Claffin v. Rosenberg*, 42 Mo. 439.) Otherwise, the sale will be presumed fraudulent and void; and this notwithstanding that the vendor remained in charge as clerk or agent of the vendee. And it is immaterial that the claimant of goods attached, purchased them of the vendee of defendant in the suit. The last vendee stands in no better condition than the intermediate purchaser unless he has taken and continued in the actual possession of the purchased goods.

Appeal from Fourth District Court.

Burgess & Hall, for appellants.

The property having been in Herriford & Lowry, a sale by them is fraudulent unless there was an actual change of possession. A mere constructive change of possession is not sufficient. (4 Hill. 297; 2 Hill. 629; 3 Sandf. 69-73; 42 Mo. 439.)

G. W. Easley, for respondent.

I. Section 10, chapter 67, R. C. 1855, only applies where the immediate vendor remains in possession after the sale.

II. Had Herriford been respondent's immediate vendee, this instruction would have been proper. Herriford might remain in charge of the goods after sale, as clerk of the vendee.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs instituted their suit by attachment, in the Linn County Circuit Court, against Herriford & Lowry; and caused a saloon and its contents to be levied upon and seized as their property. The respondent, Holly, filed an interplea, and claimed the property as his own. On the trial evidence was given tending to show that Holly had purchased the property from Harlow and Cantwell,

Lesem et al. v. Herriford et al.

and that they had purchased it from Herriford, and that Herriford continued in possession, and was still in possession when the goods were seized by attachment.

The court, at the request of the respondent, gave the following instruction: "6. Although the jury may believe from the evidence that Herriford may have remained in charge of the goods purchased by Holly of Cantwell and Harlow, after the sale from Cantwell and Harlow to Holly, yet if the jury further believe from the evidence that Herriford was in charge of the goods as the clerk, agent, or employee of Holly, then the jury are instructed that the property, being found with Herriford, was the possession of Holly, and was no evidence of fraud."

The jury found a verdict for the respondent, upon which judgment was duly rendered. This judgment was affirmed in the District Court, and the plaintiffs have brought the case here by appeal.

The action was commenced whilst the statute of 1855 was in force, and is governed by its provisions. By the tenth section of the act in relation to fraudulent conveyances, as contained in that statute, every sale made by a vendor of goods and chattels in his possession or under his control, unless the same was accompanied by delivery in a reasonable time, and followed by an actual and continued change of possession of the thing sold, was presumed to be fraudulent and void as against creditors and subsequent purchasers in good faith, and was conclusive evidence, unless it was made to appear to the jury that the sale was in good faith and without any intention to defraud. The only difference between the provisions in the statutes of 1855 and those of 1865 is that in the former, if the sale was not accompanied with an actual change of possession, the sale was deemed presumptively fraudulent, though this presumption might be rebutted by proof of the fairness and honesty of the transaction. In the latter, where there is no actual change of possession, the rule of evidence is changed, and fraud is conclusively presumed. In *Clafin v. Rosenberg* (42 Mo. 439) we had occasion to examine the subject, and we there held that the vendee must take the actual possession; and the possession must be open, notorious, and unequivocal,

such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. Any other construction would render the statute senseless and meaningless, and virtually defeat the object which induced its enactment. In this particular the statutes of 1855 and 1865 are the same. Both require actual and continued change of possession as distinguished from mere constructive change of possession—such a change as to preclude the hazard of the seller deriving a false credit from the continuance of his apparent ownership. The tenth section in the act of 1855 was a literal transcript from the New York statute, and the construction put upon it by the courts in that State was that an actual change of possession of goods sold meant an open, visible, and public change, manifested by such outward signs as rendered it evident that the possession of its owner, as such, had wholly ceased. (*Randall v. Parker*, 3 Sandf. 69.) In the instruction above copied the court ignores entirely the whole question of fraud presumptively arising out of continued possession, and assumes that there can be no fraud if the property has passed through the hands of an intermediate purchaser, although there have been no visible or outward appearances of change, and the original vendor has all the time retained and continued in possession. Should this doctrine prevail, the statute would be nugatory, and might be eluded at any time with impunity.

The last vendee stands in no better condition than his vendor, the intermediate purchaser, and the sale to both will be adjudged fraudulent unless they have taken and continued in the actual possession of the purchased goods. It will not do to hold that a person may sell a stock of goods to another party and continue in the actual possession and apparent ownership of the same, and that that party may sell to a third, who continues the original seller in possession, without any actual change being made, and then say that the transaction is outside of the statute, and that the original seller's possession is the possession of the intermediate party. Parties can not agree that the seller should remain in possession and call it the possession of the purchaser. Actual

Griffin v. Pugh.

change imports something more than a legal or fictitious change. It is not doubted that a person purchasing goods may employ his seller to act as his agent or clerk; but, before he ventures on this step, he must apprise the community, by some open, visible, outward means, that there has been an actual change in the possession of the property, and show the character in which the seller is employed.

I think the instruction is erroneous, and should not have been given. Some other questions have been presented to the court, but the above is the only material error I find in the record.

Reversed and remanded. The other judges concur.

JOHN B. GRIFFIN, Respondent, v. THOMAS PUGH, Appellant.

1. *Contract—Sale, conditional—Purchase from vendee by third party—Title—Replevin.*—By the terms of a written contract, A. agreed to sell B. a certain engine for a specified sum; and B. agreed to return the same in default of payment within six months. B. took possession of the property, and, before the expiration of the time or the payment of the money, sold it to C., who purchased without notice of the rights of A. Suit in replevin was brought by A. against C. for the property. *Held*, that the contract was at best only a conditional sale, and no title vested in B.; and (in the absence of evidence showing laches in A.) C. acquired nothing by his purchase.

Appeal from Fourth District Court.

Henry Williams, for appellant, cited 5 N. Y. 417; 17 Mass. 606; 5 Gray, 306; 7 Gray, 158; 8 Gray, 159; Sto. on Sales, § 313; 2 Kent, 768-9; 3 Cush. 575; 1 Pars. on Cont. 537, and notes.

Curtis & Pope, for respondent, cited 2 Hill. 325; 8 Gray, 159; 3 Gray, 545; Sto. on Cont. § 849, c.

CURRIER, Judge, delivered the opinion of the court.

This is an action of *replevin* for a steam boiler, etc. The defendant purchased the property in dispute of the firm of Martin, Law & Wimbsy, who were at the time in possession, under a claim of title from the plaintiff as their vendor. The title of

Griffin v. Pugh.

Martin & Co. rested upon a contract in writing between them and plaintiff, dated October 23, 1861, as follows: "This agreement entered into between Wm. Griffin, of the first part, and G. Thomas Martin, etc., of the second part, viz: the party of the first part agreed to sell the parties of the second part an engine, etc., for the sum of \$250, lawful money of the United States, in six months from date; the parties of the second part agree to return the engine, etc., to the party of the first part, in default of payment of the said amount at the time above named; interest at ten per cent. from date."

After the execution of this agreement, Martin & Co. took possession of the property, and, before the six months had expired or the \$250 had been paid, sold it to the defendant, who made the purchase without notice of the plaintiff's rights. Upon this state of facts it becomes necessary to determine the character of the transaction between the plaintiff and Martin & Co. If the transaction, evidenced by the written agreement, constituted a conditional sale, then no title vested in Martin & Co., and the defendant acquired nothing by his purchase from them, for there is no suggestion of laches on the part of the plaintiff. (*Parmelee v. Catherwood*, 36 Mo. 479; and *Little v. Page*, decided at the present term.)

In determining the character of the transaction between the plaintiff and Martin & Co., the same rules of construction are to be applied to the agreement between them, in determining its meaning, that are employed in the construction of other written instruments. As the purposes of the parties can be collected from the writing, what results did they intend to accomplish by it? It is manifest that they did not contemplate an ordinary sale. The writing employed as evidence of the bargain is wholly different from the usual bill of sale. By a literal rendering of its language there was no sale at all, but only an "agreement" to sell at a future time. In law, a sale and an agreement to sell are quite distinct. By the writing, the plaintiff agrees to sell in "six months from date" for \$250. This is language in no way suggestive of a present and absolute sale. Then Martin & Co. do not agree to buy the property, but to "return" it at the end

Meyer et al. v. Lowell.

of six months in case the \$250 should not be paid within that time. It is clear, beyond a question, that the parties did not contemplate a present actual sale and passing of title. The most that can be made of the transaction is that it constituted a conditional sale, by which the title was to pass on payment of the purchase money, and not before. *Strong v. Taylor* (2 Hill. 326) is a case strikingly like the present. In that case, which was also a *replevin* suit, the plaintiff had "agreed to sell" on condition that the purchase money was paid in a specified way, involving time in which to make the payment, as also a delivery of the property contracted to be sold. The other party agreed to buy on the terms specified. After the property was delivered to the bargainee, and before the purchase money was paid in full, it was levied upon as the property of the bargainee. It was held that the sale was conditional, and that no title passed thereby.

Judgment affirmed. The other judges concur.

MEYER, MAY *et al.*, Appellants, v. JOHN W. LOWELL, Respondent.

1. *Practice, Civil—Pleadings—Action—Account—Item—Contract, privity of.*—A statement of an account between A. and B. showed certain balances against A. C., having purchased the stock of A., wrote an indorsement on the back of the account, assuming the same, and obligating himself generally to pay it, but without any privity of contract with C. B. brought suit against C. upon the stipulation, without setting out in his petition the items of the account as provided by section 38, p. 661, Gen. Stat. 1865; but filed the account showing the balances against defendant. *Held*, that, for the purpose of the suit, the filing of that paper was sufficient, and that B. was not in such sense a stranger to the consideration of the contract as to prevent him from suing thereon in his own name.

Appeal from Fifth District Court.

Vories & Vories, for appellants.

Section 38, p. 661, Gen. Stat. 1865, is not applicable to this case. Here the written assumption of the respondent is the foundation of the action and the principal thing, and the amount of the debt the incident.

Meyer et al. v. Lowell.

Woodson, and *Strong & Chandler*, for respondent.

I. The account sued on is not a bill of items or particulars, as required by the statute. (Gen. Stat. 1865, p. 661, § 38.)

II. Plaintiffs' petition does not state facts that will in any event authorize proof or judgment. The contract or agreement sued on is an agreement between J. W. Horr & Co. and defendant Lowell, and the plaintiffs are not parties thereto. (*Manny et al. v. Frazier's Adm'r*, 27 Mo. 419; *Page v. Becker*, 31 Mo. 466; *Chitty on Cont.* 55-7.)

CURRIER, Judge, delivered the opinion of the court.

The petition shows that the firm of J. W. Horr & Co. were indebted to the plaintiffs in the sum of \$1,189.47; that, while thus indebted, the firm sold out its establishment to the defendant, who, in adjusting the purchase money, gave a stipulation, signed by him, the material parts of which, bearing upon the questions to be considered, are as follows: "Having purchased the stock of goods of J. W. Horr & Co., * * * I hereby assume the within account of May, Weil & Co. (the plaintiffs) so far as the same may be correct, * * * and obligate myself to pay the same, or so much thereof as I may be bound for, in six months from date." This stipulation is indorsed on the back of the plaintiffs' account against said Horr & Co., which shows the aggregates or balances against them for different sales of merchandise, sixteen in all, amounting to the said sum of \$1,189.47.

The petition counts on this stipulation as an agreement on the part of the defendant to pay the plaintiffs the amount of Horr & Co.'s indebtedness to them, subject to the conditions set out in the agreement.

At the trial, all evidence tending to establish the correctness of the account referred to in the stipulation was excluded upon the ground that no copy of the account, as contemplated by the statute (Gen. Stat. 1865, p. 661, § 38), was filed with the petition, or the items thereof set out in the pleading. The account

Meyer et al. v. Lowell.

of six months in case the \$250 should not be paid within that time. It is clear, beyond a question, that the parties did not contemplate a present actual sale and passing of title. The most that can be made of the transaction is that it constituted a conditional sale, by which the title was to pass on payment of the purchase money, and not before. *Strong v. Taylor* (2 Hill. 326) is a case strikingly like the present. In that case, which was also a *replevin* suit, the plaintiff had "agreed to sell" on condition that the purchase money was paid in a specified way, involving time in which to make the payment, as also a delivery of the property contracted to be sold. The other party agreed to buy on the terms specified. After the property was delivered to the bargainee, and before the purchase money was paid in full, it was levied upon as the property of the bargainee. It was held that the sale was conditional, and that no title passed thereby.

Judgment affirmed. The other judges concur.

MEYER, MAY *et al.*, Appellants, v. JOHN W. LOWELL, Respondent.

1. *Practice, Civil — Pleadings — Action — Account — Item — Contract, privity of.*—A statement of an account between A. and B. showed certain balances against A. C., having purchased the stock of A., wrote an indorsement on the back of the account, assuming the same, and obligating himself generally to pay it, but without any privity of contract with C. B. brought suit against C. upon the stipulation, without setting out in his petition the items of the account as provided by section 38, p. 661, Gen. Stat. 1865; but filed the account showing the balances against defendant. *Held*, that, for the purpose of the suit, the filing of that paper was sufficient, and that B. was not in such sense a stranger to the consideration of the contract as to prevent him from suing thereon in his own name.

Appeal from Fifth District Court.

Vories & Vories, for appellants.

Section 38, p. 661, Gen. Stat. 1865, is not applicable to this case. Here the written assumption of the respondent is the foundation of the action and the principal thing, and the amount of the debt the incident.

Meyer et al. v. Lowell.

Woodson, and *Strong & Chandler*, for respondent.

I. The account sued on is not a bill of items or particulars, as required by the statute. (Gen. Stat. 1865, p. 661, § 38.)

II. Plaintiffs' petition does not state facts that will in any event authorize proof or judgment. The contract or agreement sued on is an agreement between J. W. Horr & Co. and defendant Lowell, and the plaintiffs are not parties thereto. (*Manny et al. v. Frazier's Adm'r*, 27 Mo. 419; *Page v. Becker*, 31 Mo. 466; *Chitty on Cont.* 55-7.)

CURRIER, Judge, delivered the opinion of the court.

The petition shows that the firm of J. W. Horr & Co. were indebted to the plaintiffs in the sum of \$1,189.47; that, while thus indebted, the firm sold out its establishment to the defendant, who, in adjusting the purchase money, gave a stipulation, signed by him, the material parts of which, bearing upon the questions to be considered, are as follows: "Having purchased the stock of goods of J. W. Horr & Co., * * * I hereby assume the within account of May, Weil & Co. (the plaintiffs) so far as the same may be correct, * * * and obligate myself to pay the same, or so much thereof as I may be bound for, in six months from date." This stipulation is indorsed on the back of the plaintiffs' account against said Horr & Co., which shows the aggregates or balances against them for different sales of merchandise, sixteen in all, amounting to the said sum of \$1,189.47.

The petition counts on this stipulation as an agreement on the part of the defendant to pay the plaintiffs the amount of Horr & Co.'s indebtedness to them, subject to the conditions set out in the agreement.

At the trial, all evidence tending to establish the correctness of the account referred to in the stipulation was excluded upon the ground that no copy of the account, as contemplated by the statute (Gen. Stat. 1865, p. 661, § 38), was filed with the petition, or the items thereof set out in the pleading. The account

Meyer et al. v. Lowell.

itself, however, was filed with the petition—that is, the account referred to in the defendant's stipulation—and that must be deemed sufficient for the purposes of this action, which is not founded upon the account, but upon the defendant's written contract. The court was therefore wrong in excluding the evidence in question.

The more difficult question raised in the cause relates to the sufficiency of the petition. It is objected that it does not state facts sufficient to constitute a cause of action, in the plaintiffs' name and favor, against the defendant. And this starts the inquiry whether the plaintiffs were in such sense strangers to the consideration of the contract as to preclude them from suing thereon in their own names.

✕ The decisions on this subject have not been uniform—the more ancient rulings, in like cases, inclining against the right thus to sue; while the more modern, and especially the American, cases lean in its favor. Parsons states the matter thus: “In some cases in which the consideration did not pass directly from a plaintiff, and the promise was not made directly to him, it has been made a question how far he might avail himself of it, and bring an action in his name, instead of the name of the party from whom the consideration moved, and to whom the promise was made. It seems to have been anciently held as a rule of law (though not uniformly so) that no stranger to the consideration of an agreement could have an action thereon, although it were made for his own benefit. * * * But it seems to be held in recent cases that, while the rule itself is not denied, it would be generally held inapplicable where the beneficiary has any concern whatever in the transaction. * * * In this country the right of a third party to bring an action on a promise made to another for his benefit, seems to be more positively asserted, and we think it would be safe to consider this a prevailing rule with us; indeed, it has been held that such promise is to be deemed made to the third party if adopted by him, though not cognizant of it when made.” (1 Pars. on Cont. 466, § 15.)

In *Lawrence v. Fox* (20 N. Y. 268) it was held, upon a thorough review, that an action lies on a promise made by the defendant,

Meyer et al. v. Lowell.

upon valid consideration, to a third party for the benefit of the plaintiff, although the plaintiff was not privy to the consideration; and that (per Johnson, C. J., and Denio, J.) such promise is to be deemed made to the plaintiff if adopted by him, though he was not a party to or cognizant of it when made. In that case the plaintiff had no direct connection with the promise, nor was it made to him, nor did the consideration proceed from him. The action was, nevertheless, sustained. In *Robbins v. Ayres* (10 Mo. 538), the defendant bought a boat of a third party, and agreed to pay the "hands" on the boat \$600, as a part of the consideration; and it was held that the "hands" might sue for and recover the amount in an action in their own names, provided the promise to pay the \$600 was upon a contract not under seal, and that there was no necessity of a consideration moving from the "hands." *Bank of Missouri v. Benoist & Hackney* (10 Mo. 519) was cited as settling this doctrine. These cases are not overruled in *Manny v. Frazier* (27 Mo. 419), and *Page v. Becker* (31 Mo. 466). Ewing, J., in delivering the opinion of the court in the latter case, recognized the case in 10 Mo. as holding that "where the promise was made for the benefit of a third person, he might in his own name maintain an action against the promisor," and then proceeds to pass upon the case he had under consideration upon its own peculiar facts. So the court held in *Manny v. Frazier* that the principle involved in the former decision did not apply to that case. It is my opinion, therefore, in view of the previous decisions of this court and the general drift of the later adjudications, that the plaintiffs may maintain an action in their own name against the defendant upon the contract sued upon. This result involves no injustice to the defendant, but simply holds him to accountability upon his undertaking, according to its evident purpose and intent.

The action of the District Court in affirming the judgment of the Common Pleas Court is accordingly reversed and the cause remanded. The other judges concur.

WILLIAM B. JENNINGS *et al.*, Respondents, *v.* FRANK BRIZEADINE, Appellant.

1. *Deeds — Description — Patent ambiguity — Inaccuracy in, how cured.*—In an action of ejectment for certain land sold plaintiff under a deed of trust, the deed described it as "lot forty-six;" and a plat of the survey of the town where the land was situated being put in evidence showed that the town was laid off in lots and blocks, and that no lots were numbered as high as forty-six: *held*, that the ambiguity in the deed was patent, and that parol evidence was inadmissible to show that the deed was designed to convey block forty-six. If the description was inaccurate, and failed to express the intention of the parties, plaintiff should have applied to the grantor, or, in case of his refusal, to a court of equity, to have the deed reformed and the mistake corrected.
2. *Deeds — Description, where certain, can not be contradicted by parol testimony.*—If, in a deed conveying premises, the description is certain, parol evidence of the intent, the acts, and declarations of the parties, going to establish a different location or another designation, is inadmissible, as contradicting or varying the deed.
3. *Deeds — Where intention of parties is plain on face of instrument, courts can go no further.*—If the will of parties to a deed be plain upon the face of the instrument, courts should go no further in determining its meaning, even though the words used frustrate the grant itself.

Appeal from Fifth District Court.

Asper & Pollard, with whom was *W. P. Hall*, for appellant.

Where the description of the deed is particular, that must be followed; and if there is no property to which it can apply, the grant fails. (2 Washb. Real Prop. 669-71; *Smith v. Strong*, 14 Pick. 128; *Whiting v. Dewey*, 15 Pick. 434; *Winn v. Cattell*, 18 Pick. 534; *Dana v. Middlesex*, 10 Met. 250; 4 Kent's Com. 467.) Both deeds made by Harker, sheriff, refer to the same sale. The first is an execution of the power, and the second is a nullity.

II. The court erred in the instructions for the plaintiff, whereby the jury were required to consider parol evidence, and find that lot 46, in the description of the trust deed, meant block 46. (1 Greenl. Ev. §§ 297-301; *Serjeant v. Adams*, 3 Gray, 72-77; *Miller v. Travers*, 8 Bing. 244; *Barnes v. Leonard*, 10 Mass.

Jennings et al. v. Brizeadine.

459; 43 Maine, 600; 2 Washb. Real Prop. 669-70, §§ 37, 38; Worthington v. Hillyer, 4 Mass. 196; Smith v. Strong, 14 Pick. 128; Atkinson v. Cummins, 9 How. 479.) The general description following the number will not control as against the particular preceding description, but must give way to it. (2 Washb. Real Prop. 670, § 38; 1 Greenl. § 301.)

Jas. McFerran, for defendant in error.

I. The deeds of sheriff Harker to the defendant in error, read in evidence by the parties, conveyed the legal title to the land in controversy to the defendant in error. (5 Johns. Ch. 44; 12 U. S. Dig. 627, § 367; Beattie v. Butler, 21 Mo. 319.)

II. The description of the land in controversy is sufficient, both in the petition and in the deeds read in evidence to the jury. (Clark v. Wethey, 19 Wend. 320; 4 U. S. Dig. 537, §§ 435, 439; Dodge v. Potter, 18 Barb., N. Y., 193; 15 U. S. Dig. 157, § 121.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit in ejectment, brought in the Livingston Circuit Court, to recover possession of block 46, in the city of Chilli-cothe. The petition was in the usual form, describing the property as follows: "Lot number forty-six (46), the same being block forty-six (46)." The answer denied that plaintiff was entitled to possession, and set up title in one of the defendants. There was a replication filed. The plaintiff deduced title by virtue of a sale made under a deed of trust.

The cause coming on to be heard, the plaintiff introduced William Keith as a witness, who testified that he was the grantor in the deed of trust, executed by himself and wife, to W. Y. Slack as trustee, dated October 8, 1860, and resided on the property conveyed by the deed of trust. It was always known as block 46; was known to him by that description; so given to the assessor; and witness never heard it called anything else until the deed was made. The deed described it as lot 46. Mr. Jennings made the deed, and said that the new survey of the town

so called it. The plat on last survey of the town was then introduced by the plaintiff, a copy of which is embodied in the bill of exceptions, from which it appears that the town is laid off in lots and blocks, and that no lots are numbered as high as 46. The property in controversy is designated as block 46, but does not seem to have been subdivided into lots. The plaintiff then offered in evidence the deed of trust to Slack as trustee, made by Keith and wife, in which the property is described as lot 46. The next evidence offered by the plaintiff was the deed of the sheriff of Livingston county, who executed the trust—Slack having in the meantime died—conveying the property to plaintiff, who purchased at the sale, wherein it is described as “lot 46, the same being block number forty-six (46), in the city of Chillicothe, according to the third and last survey of said city.” To the introduction of all the above testimony the defendants objected; but the court overruled their objections, and exceptions were duly taken. Under instructions given by the court, the jury found a verdict for the plaintiff, and judgment was entered thereon. That judgment was affirmed in the District Court, and the cause is now pending here by appeal.

The first objection that will be considered is the action of the court in admitting parol testimony to show that block 46 was intended by the description “lot 46.” The rule is that to render a deed or other instrument void for uncertain description, the ambiguity must be patent and appear on the face of the instrument; but where the uncertainty is raised by matter outside of the instrument, the ambiguity is latent, and may be explained by the application of extrinsic evidence. (*Hardy v. Matthews*, 38 Mo. 121, and cases cited.) “A latent ambiguity,” says Sugden, “is that which seems certain and without ambiguity for anything appearing on the face of the instrument, but there is some collateral matter out of the instrument that breeds the ambiguity; and, as it is raised by extrinsic evidence, it may fairly be dissolved by the same means.” Where words apply equally to different things or subject-matters, evidence is admissible to show which of them was the thing or subject-matter intended. If, in a deed conveying premises, the description is certain, parol evidence of

Jennings et al. v. Brizeadine.

the intent, the act, and declarations of the parties, going to establish a different location or another designation, is inadmissible, as contradicting or varying the deed. Courts are to so construe the words of a grant, if possible, as to give effect to it, if it be plain that the parties intended it as an effective conveyance. In the construction the expressed will of the parties is to control. If this be plain upon the face of the instrument, courts are to go no further, though the words used frustrate the grant itself. Where the expression of the intent is doubtful and ambiguous, the most material and certain among the evidences of intent are to be selected and accredited. That which is most material and most certain in a description shall control that which is less material and less certain. (*Newsom v. Pryor*, 7 Wheat. 10; *Doe v. Thompson*, 5 Cow. 393; *Seaman v. Hogeboom*, 21 Barb. 398.)

Where there are certain particulars in the description of the thing intended to be granted which can be sufficiently ascertained, the addition of any mistaken or uncertain circumstance will not, and ought not to, defeat or frustrate the intention of the parties.

In this case the description is plain, explicit, and certain. The deed of trust conveys lot 46. Were it shown that there were two lots in Chillicothe numbered 46, then a latent ambiguity would arise, which might be removed by extrinsic evidence, and it would be competent to prove by parol testimony which lot was intended. But it is not pretended that such a state of facts exists. The plat shows that Chillicothe is laid off in blocks and lots, none of which lots are numbered as high as forty-six; and when a deed is clear and precise, and conveys a lot, its terms can not be varied or altered so as to show that a block was thereby intended. If the description was inaccurate, and failed to express the intention of the parties, the plaintiff should have applied to the grantor, or, in case of his refusal, to a court of equity, to have the deed reformed and the mistake corrected. The court therefore erred in overruling the defendant's objections and admitting the parol evidence. For like reasons the deed of the trustee was ineffectual to convey anything more than the lot as described in the original deed of trust. The deed of trust conveyed lot 46; and, in the

Furnold v. The Bank of the State of Missouri et al.

execution of his powers, the trustee could only sell and convey according to that description. His attempt to explain and give a new designation to the property sold was unwarranted and unavailing.

I think the judgment should be reversed and the cause remanded for further proceedings. The other judges concur.

THOMAS C. FURNOLD, Defendant in Error, v. THE BANK OF THE STATE OF MISSOURI *et al.*, Plaintiffs in Error.

1. *Equity — Co-sureties — Contribution — Judgment liens — Subrogation.*—

Judgment was recovered against a number of co-sureties, who, subsequently thereto, sold sundry lands owned by them respectively while the same were subject to the lien of the judgment. The purchaser of one parcel, to prevent its sale under the judgment, paid the amount due thereon, and afterward brought suit in equity, praying that the land disposed of by the co-sureties, while subject to the same lien, might be subjected to a ratable proportion of the debt paid by him. *Held*, that while at law plaintiff's payment of the amount of the judgment operated as an extinguishment of the lien, yet equity, in furtherance of justice, would subrogate plaintiff to the rights of his grantor, and charge the lands bound by the lien in the hands of the other sureties or their grantees who purchased with notice. And the payment of the debt by plaintiff operated in equity as an immediate assignment to him of all the securities held by the judgment creditor. In such case it was the duty of the latter to make the transfer *instante*.

Error to Fifth District Court.

Jas. McFerran, for plaintiffs in error.

The Circuit Court erred in substituting the defendant in error in the place of Thomas Preston as co-security, and in holding that the defendant in error had a right to have the lien revived, and his claim enforced against the land of Selby, Cox & Gifford.

Asper & Pollard, for defendant in error.

I. In this case plaintiff stands in the same situation as a surety, and is entitled to the same equities. (1 Sto. Eq. § 638; *Chesebro v. Millard*, 1 Johns. Ch. 409; *King v. Baldwin & Fowler*, 2

Furnold v. The Bank of the State of Missouri et al.

Johns. Ch. 554; Moses v. Murgatroyd, 1 Johns. Ch. 119; Hays v. Ward, 4 Johns. Ch. 130; Curtis v. Tyler, 9 Paige, 32; Miller v. Woodward & Thorne, 8 Mo. 169; Crump v. McMurtry, *id.* 408; Cole County v. Angney, 12 Mo. 132; Seeley's Adm'r v. Beck, 42 Mo. 143.)

II. Where land is charged with a burden, the charge ought to be equal, and each part must bear its equal proportion; and the court will compel the creditor to aid this right of contribution by assigning his bond or security to the surety or owner of the land, who has to pay the debt. (Stephens v. Cooper, 1 Johns. Ch. 425.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity, seeking to subject certain lands owned by some of the defendants to the payment of a ratable sum which the plaintiff had been compelled to pay by reason of a lien existing on his land, and to require the Bank of the State of Missouri to assign certain claims and judgments to plaintiff.

It appears from the record that one Francis Preston borrowed a sum of money from the Bank of the State of Missouri, at Chillicothe, and that Thomas A. Preston, Hudson, and Austin, all of whom are made defendants, were his securities for the payment of the money. Francis Preston, the principal, died, and the bank proved up the demand against his estate. The administrator of Preston, deceased, paid a portion of the demand; and the balance remaining unpaid, suit was commenced against the sureties, and judgment recovered. After the rendition of the judgment, and while the same continued a lien on the realty, Thomas A. Preston, one of the defendants, for a full consideration, sold and conveyed his land to the plaintiff. The other two sureties also possessed real estate, on which the judgment constituted a lien. Before the expiration of the lien, the bank sued out execution on its judgment, and levied the same on the lands owned by the plaintiff, and which he had purchased of Thomas A. Preston. Plaintiff, to protect himself and keep his lands from being sold, paid up the full amount and satisfied the execution, and then

Furnold v. The Bank of the State of Missouri et al.

applied to the bank to assign to him the judgment against the defendants, on which execution had been issued and the land levied upon, and also the claim against the estate of Preston, deceased. Previous to this, and while the lien was subsisting, Hudson and Austin sold and conveyed their real estate to Selby, Cox & Gifford, who are made parties to this suit. The plaintiff, in his petition, alleged the insolvency of Hudson and Austin; a confederacy and combination on the part of the defendants to cheat and defraud him, and to compel him to pay the whole of the debt; and prayed that the land formerly owned by Hudson and Austin, and purchased by Selby, Cox & Gifford, might be subjected to a ratable proportion of the debt, and that the bank be compelled to assign to him the judgment and claim before mentioned. There was a demurrer to the petition, which was overruled; and no answer being filed, judgment was given in substantial compliance with the prayer, which judgment was affirmed in the District Court.

This suit was instituted before the judgment lien expired, but it is contended for the plaintiffs in error that the proceeding is not sustainable; that the payment by the plaintiff operated as a complete discharge of the debt and a full extinguishment of the lien, and that it can not be further revived and extended; and that plaintiff's only recourse is an action against his grantor, who, it is alleged in the petition, is insolvent.

It has been uniformly declared and fully acted upon, in the courts of chancery in this country, that the claim for contribution among co-sureties, as well as the claim for indemnity on the part of the surety against the principal, is founded not upon contract, but upon a principle of natural justice and equity; the maxim adopted in regard to co-sureties being that equality is equity among persons standing in the same situation. (1 White & T. Lead. Cas. in Eq. 105, Am. note.) This equity springs up at the time the relation is entered into, and is consummated when the surety has paid the debt. (Wayland v. Tucker, 4 Grat. 268.)

The practice of subrogation or substitution, or the cession of remedies, is borrowed from the civil law, and, under the guidance of Chancellor Kent, has gone further in this country than in England. It is the creature of equity, and is administered so as

Furnold v. The Bank of the State of Missouri et al.

to secure real, essential justice, without regard to form. (*Enders v. Burne*, 4 Rand. 438; *Douglass v. Fagg*, 8 Leigh, 588.)

As soon as the surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor held against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully as the creditor could have done, for the purpose of obtaining indemnity from the principal. He is considered as at once subrogated to all the rights, remedies, and securities of the creditor—as substituted in the place of the creditor—and entitled to enforce all his liens, priorities, and means of payment as against the principal, and to have the benefit of even securities that were given without his knowledge. (*Miller v. Woodward*, 8 Mo. 169; *McCune v. Belt*, 38 Mo. 28; *Seeley v. Beck*, 42 Mo. 143; *Hayes v. Ward*, 4 Johns. Ch. 123; *Lidderdale v. Robinson*, 12 Wheat. 594.) In *Lathrop and Dale's* appeal (1 Barr, 512), *Kennedy, J.*, reviewed the cases, and said: "From the cases it would appear that we have adopted the general rule that a surety, by paying the debt of his principal, becomes entitled to be subrogated to all the rights of the creditor, so as to have the benefit of all the securities which the creditor had for the payment of the debt, without any exception—as well those which became extinct, at law at least, by the act of the surety's paying the debt, as all collateral securities which the creditor held for the payment of it which have not been considered as directly extinguished by the surety's paying the debt. These decisions have been made upon a supposed principle of equity, which, for the purpose of doing justice to the surety who has paid the debt, interposes to prevent the judgment or security which has been so extinguished at law from being so considered as between the surety and the principal or his subsequent lien creditors."

In the case *ex parte Crisp* (1 Atk. 133), Lord Chancellor Hardwicke said that where the surety paid off a debt he was entitled to have from the creditor an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion. Particular stress is laid on the fact that the plaintiff in this case was not one of the sureties, and that he

Furnold v. The Bank of the State of Missouri et al.

bought with notice of the lien. This is true, and at law he would have no other remedy than an action against his vendor; but it must be borne in mind that the judgment notified him of the lien it created against the other parties, and of their liability to contribution, and he had a right to expect that they would pay their respective proportions. While he would have no redress in law in such a case, equity, in furtherance of justice, will subrogate him to the rights of his grantor, and charge the lands bound by the lien in the hands of the other sureties or their grantees who purchased with notice. Moreover, there is a direct allegation in the bill, which stands confessed, that there was a confederation and collusion on the part of all the defendants to make plaintiff pay the whole amount, and shield themselves from liability. A court can lend no countenance to such an arrangement. A creditor will not be allowed to collude with favorites, and perpetrate a wrong and fraud against a third party. The bank laid by and held on to its judgment till a short time before the expiration of its lien, and then sued out execution. The plaintiff offered to pay it the full amount, providing it would assign to him the judgment, in order that he might keep the lien alive and protect himself. This the bank refused to do, and would do nothing but receive the money and enter satisfaction on the execution. It was then doubtless supposed that the lien was extinguished and the plaintiff's remedy was gone. But this, as we have seen, was a mistake. The payment of the debt did not discharge the lien as to those who were liable to contribution. And the payment operated in equity as an immediate assignment to the plaintiff of all securities held by the bank; and it was the duty of the bank, *instantly*, to make the transfer. By the refusal of the bank to perform a plain requirement of law, no lien was divested and no right destroyed. If there was collusion, happily the question was presented in such a shape, and the facts are so clear, that there is no difficulty in the court intervening and balking the combination. But put the most charitable construction on the transaction, and say that the bank acted from mistaken views, still the case is the same. The plaintiff, when he discharged the encumbrance, was subrogated to the rights

DeKalb County v. Hixon et al.

of his vendor, and entitled to all the liens, priorities, and securities held by the creditor.

The action of the court in overruling the demurrer was correct, and the judgment will be affirmed. The other judges concur.

DEKALB COUNTY, Defendant in Error, v. THOMAS H. HIXON
et al., Plaintiffs in Error.

1. *Practice, Civil—Appeal—Right of court to amend its records after.*—Where, a cause having been appealed to the District Court, the record showed a dismissal as to a certain defendant, but no final judgment, and a writ of *certiorari* in the cause showed that the judgment had been ordered, but the clerk had omitted to enter it of record, the court below properly ordered its records amended *nunc pro tunc*, so as to show that final judgment followed the order of dismissal. The court had lost jurisdiction of the case, but not of its records.

Error to Fifth District Court.

S. A. Richardson, for plaintiffs in error

I. The order of the Circuit Court dismissing this case is not such an order as a writ of error will lie for. (1 Mo. 222; 35 Mo. 190; 33 Mo. 117.)

II. The judgment of the Circuit Court does not help the case. It was rendered after the case was taken by writ of error to the District Court, and while the case was pending in the District Court. The Circuit Court, at the time of entering up that final judgment, had no jurisdiction whatever of the cause. (*Ladd et al. v. Couzins*, 35 Mo. 515; 41 Mo. 403.)

Strong & Chandler, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

The question here raised relates to the authority of the Circuit Court in ordering amendments of its own records. In that court the plaintiff dismissed as to one of the defendants, and the court, at a subsequent term, on motion of the remaining defendants,

DeKalb County v. Hixon et al.

dismissed the suit as to them. The amended transcript, brought into the District Court on *certiorari*, shows that when the court directed the dismissal it also ordered final judgment, which the clerk omitted to enter of record.

After an appeal, and while the cause was pending in the District Court, the Circuit Court ordered its records amended so as to show that a final judgment followed the order of dismissal; the record entry of the judgment being made *nunc pro tunc*. The defendants (plaintiffs in error) objected to this as unwarranted and beyond the jurisdiction of the court.

The objection is not well taken. The court had lost its jurisdiction of the case, but not of its records. It had authority, as well after as before the appeal, to amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal. (Welch v. Damon, 11 Gray, 383; Chichester v. Cande, 3 Cow. 42, note *a*; Mechanics' Bank v. Minthorne, 19 Johns. 244; Richardson v. Mellish, 11 Eng. C. L. 173.)

The collateral effects of such amendments, as regards liens and the rights of third parties, are not under consideration. Ladd v. Couzins, 35 Mo. 513, and Stewart v. Stringer, 41 Mo. 400, authorities relied upon by the defendants, are not in point. In these cases the things proposed to be done were rather additions to the proceedings than amendments of the records. The language of the court is to be construed in connection with the facts of the respective cases to which that language was applied. The parties proposed to bring upon the record fresh facts—new proceedings, which had not been recorded because they had not occurred until after the appeal. In fine, they proposed to deal with the *case*, and the court below had ceased to have any jurisdiction over *that*.

The action of the District Court reversing the judgment of the Circuit Court is affirmed. The other judges concur.

State of Missouri v. McCollum.

STATE OF MISSOURI, Appellant, *v.* ALEXANDER MCCOLLUM,
Respondent.

1. *Criminal law — Perjury — Indictment for falsely taking oath of loyalty.*—

An indictment for falsely taking the oath prescribed by section 6, art. XIII, of the State constitution, charging defendant with having "enrolled and caused himself to be enrolled" as disloyal, is not contradictory. Instead of following the language of section 3, art. II, and using the disjunctive "or," the indictment, in such cases, should properly employ the word "and," unless it unites things that are repugnant. And it was unnecessary to set forth the purpose or intent of the enrollment. The phrase in section 3, art. II, "or for any other purpose," superadded to the other objects of enrollment, makes the section mean the same thing as though no object or purpose was mentioned. Defendant may show a good reason for his enrollment. But the special emergency relied upon to justify in the particular instance is a matter of defense.

Appeal from Fifth District Court.

H. B. Johnson, Attorney-General, with whom were *Collins*, and *Asper & Pollard*, for appellant.

I. The indictment is good. (State v. Neal, 119; Campbell v. People, 8 Wend. 636; Const. of Mo., art. 13, § 6; Gen. Stat. 1865, ch. 203, §§ 1-2; 3 Am. Crim. L., 6th ed., §§ 2259, 2260; Whart. Prec. of Indictments, 590.)

II. There is nothing in the objection that the indictment charges that the defendant enrolled and caused himself to be enrolled as a southern sympathizer. When a statute forbids several things in the alternative, it is competent to charge him with all, and sufficient to prove him guilty of either. (1 Bish. Crim. L. 273, 863; Commonwealth v. Tuck, 20 Pick. 356; Stevens v. Commonwealth, 6 Met. 241; State v. Slocum, 8 Black, 313; State v. Woodward, 23 Verm. 616; 1 Bish. Crim. Proc. 191-3, 334; Wingard v. State, 13 Ga. 396-8; Rex v. North, 6 Dowl. & R. 143.)

III. It was not necessary to allege or prove the purpose with which defendant enrolled or caused himself to be enrolled as stated. The law would presume it was for some purpose; and if for any purpose, it is sufficient.

BLISS, Judge, delivered the opinion of the court.

Defendant was indicted in Harrison county for falsely taking the voter's oath at the election to take the sense of the people upon the adoption of the present State constitution. He demurred to the indictment; the demurrer was sustained, and the action of the court was affirmed in the District Court, and the State comes here upon appeal.

The indictment charges that the defendant, before taking the oath, had "personally appeared before Stephen C. Allen, military enrolling officer, and enrolled and caused himself to be enrolled, by and before said enrolling officer, as disloyal and a southern sympathizer, in pursuance of and under order No. 24 of 1862," giving the time and place of such appearance. The oath was the one prescribed in section 6, article 13, of the constitution, which is substantially recited in the indictment; and by that oath the defendant is charged with swearing that he was well acquainted with the terms of the third section of article 2, and had never directly or indirectly done any of the acts therein specified. The specific act the defendant is charged with doing is described in said section as follows: "or has ever, with a view to avoid enrollment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal or as a southern sympathizer," etc.

Seven objections are raised by the demurrer. One—that the provision under which defendant is indicted is contrary to the constitution of the United States—has already been tried, decided by this court, and will not now be considered. The sixth objection is founded on the charge that "he enrolled and caused himself to be enrolled," etc., and it is claimed to be contradictory. It so seems at first blush; still, if one enrolls himself, he certainly causes himself to be enrolled. If the language of the article had been followed, the indictment would have been bad for uncertainty, the disjunction "or" making it doubtful which he did. "And" is the proper word in such cases, unless it unites two things that are repugnant. (Whart. Crim. L. §§ 294-5.)

State of Missouri v. McCollum.

Objection is also made to the indictment because it fails to show the purpose or intent of the enrollment. It is a universal rule that when the criminality of an act depends upon its intent or object, that intent, etc., must be specified, or no crime is charged; as, for instance, an assault with intent, etc., breaking into a house in the night-time, with intent, etc. The intent is the gist, the essence of the crime, and no crime is laid without it. But if the purpose forms no part of the offense—if the act itself is expressly condemned, whatever the purpose—I can not see that the intent forms any part of the description of the act. As, suppose it was made a misdemeanor for a person not a member of the family, with force and arms, to batter and break down the doors of a dwelling-house in the night-time, for any purpose whatever. It would, in such a case, hardly be held to be necessary to aver a purpose in the indictment, although in defense the accused may show a good reason for his act. The rule should be that if the act itself is condemned without regard to its object, the special emergency relied upon to justify in the particular instance is matter of defense. The law fixes a disability as consequent upon voluntary enrollment as disloyal, for certain objects, "or for any other purpose," which means precisely the same as though no object or purpose was mentioned. If the objects specified were alone given, the pleader should state which one prompted the act, but he can not be supposed to know all possible objects. If any existed that would justify the enrollment, the defendant knew it; and, upon the hypothesis that an innocent enrollment will justify a denial upon oath of any enrollment, he may give it in defense.

Defendant objects to the assignment of perjury, because it is not shown that he enrolled himself as disloyal "by or before any officer known to the law or military orders." The existence and official acts of our State officers during the late war are matter of recent history, and will be noticed by the courts when properly brought before them. The enrollment spoken of in the indictment and in the constitution, and the officers before whom it was made, as well as the order upon which it was based, are all public matters, well known to all; and it is sufficient to mention them,

State of Missouri ex rel. Ensworth v. Albin et al.

without encumbering pleadings with their minute history and description.

A few other objections to the indictment were made, but they are without foundation. It seems to us that this indictment is a good one, especially under the liberal provisions of our statute.

The judgment of the District and Circuit Courts will be reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* SAMUEL ENSWORTH, Plaintiff,
v. WM. M. ALBIN *et al.*, Defendants.

1. *Elections—Judge of Buchanan Common Pleas Court—Certificate of election—Duty of County Court in granting.*—In an action of *mandamus* contesting the office of judge of Buchanan Court of Common Pleas, under the act of February 3, 1853 (Sess. Acts 1853, p. 78), where the evidence showed that there was but one candidate for the office, or the certificate of the clerk showed that a candidate had received a majority of the votes and was elected at a regular election, and without contest, the functions of the County Court were simply ministerial, and nothing remained for them but to issue the commission. They were invested with no discretion, and had no judicial functions to perform, the County Court being an inferior tribunal. And, under the constitution and laws of this State, where, in such case, it refused to issue the commission, this court has supervisory power, and may compel it to act. The words "or decided by said County Court to be entitled to said office," as employed in that act, have reference to a case where a contest has been had, or where two persons have received the same number of votes, and it becomes necessary to determine which shall hold and occupy the office.
2. *Election—Common Pleas Court of Buchanan county—Mandamus—Prior registration.*—An election held for the office of judge of Buchanan Court of Common Pleas, under the act of February 3, 1853 (Sess. Acts 1853, p. 78), should have been preceded by a registration of voters, otherwise the election would be invalid; and in case of proceedings for *mandamus* to compel the County Court of Buchanan county to issue the commission of judge to relator, the writ will be denied unless the petition show such prior registration.

Petition for mandamus.

Relator's petition alleged, in substance, that on the 3d day of August, 1869, an election was held in the county of Buchanan by the qualified voters of the county, at which relator was elected judge of the Court of Common Pleas of that county, and thereby

State of Missouri ex rel. Ensworth v. Albin et al.

became entitled to that office; that, after the said 3d day of August, 1869, the judges of the several election districts returned to the clerk of the County Court the poll-books; and the clerk and two justices of the peace, within eight days after the election, duly examined and cast up the votes given to each candidate, and, upon such casting up, it was ascertained that relator had received the highest number of votes; that thereupon the clerk executed and delivered to him a certificate of election. Relator further alleged that after he had received the certificate he presented the same to the said justices of the County Court of Buchanan county, and demanded of them his commission as judge, but that said justices refused to issue it. Relator prayed a writ of *mandamus* requiring the justices of said County Court to show cause why a peremptory *mandamus* should not issue compelling them to deliver said commission.

Respondents demurred to the petition on the grounds, among other things, that the petition showed that the County Court had passed upon the matter complained of therein, and that it failed to show that there was a special registration of the voters of Buchanan county prior to the alleged election.

Hall, Vories, and Woodson, for relator.

I. The relator having been duly elected judge, it was the duty of the County Court to issue him his commission. They had no discretion; and, in such a case, a *mandamus* is the proper remedy. (3 Hill. 53; 27 Ill. 247; 10 Mo. 629; 41 Mo. 225.)

II. No special registration was required preceding this election. This was not a special election.

III. The failure of registration officers to do their duty can not defraud the people of the right to elect their officers. (Wiley on Constitutional Limitations.)

Everett, Reed, and Pike, for respondent.

I. Discretionary power is vested in the County Court for the purposes contemplated by the statute, and such discretion can be exercised in all cases involving a right to a commission. The granting of commissions is not a ministerial, but a judicial act,

State of Missouri ex rel. Ensworth v. Albin et al.

and therefore invokes the exercise of discretionary power. (Bartley v. The Governor, 39 Mo. 400.)

II. *Mandamus* will not lie against an inferior judicial tribunal to interfere with its discretion unless that discretion has been corruptly and arbitrarily exercised. Nor will it lie to correct its errors, nor to restrain it from exercising its judicial functions. (23 Mo. 449; 41 Mo. 221; *id.* 247; 18 Wend. 87; 35 Barb. 106; 1 Denio, 617, 644; 5 Ohio, 542; 4 Ohio, 351; 13 Pet. 279, 404; 4 Pet. 105; 39 Mo. 388.)

III. The election for judge of the Court of Common Pleas, under the act of 1853, must conform in every respect to the law regulating the election of members of the Legislature, and there must be the same registration of voters preceding the election in either case. The relator's petition should contain the averment of a prior registration. (37 Mo. 330.)

WAGNER, Judge, delivered the opinion of the court.

The objection that this court is precluded from issuing a *mandamus* in this case, because the County Court has the right to decide who is elected judge of the Buchanan Court of Common Pleas, is not tenable. The act establishing the Court of Common Pleas provides that "when two or more persons shall receive an equal number of votes for said office, and more than any other person, the County Court of said county shall decide which one of them shall hold the same; and whenever there shall be a contested election, the said county shall decide the same." The act further provides that "when said officer shall be elected, or decided by the County Court to be entitled, to said office, the justices of said court shall make out a commission, signed by them or a majority of them, attested by the clerk of said court under his seal of office, who shall immediately deliver the same to the person thus chosen. (Sess. Acts 1853, p. 78.) By the foregoing provisions the functions of the County Court are in the first instance ministerial, though their judicial action may be evoked on the happening of a certain contingency. The words "or decided by said County Court to be entitled to said office" have reference to a case where a contest has been had, or where

State of Missouri ex rel. Ensworth v. Albin et al.

two persons have received the same number of votes, and it becomes necessary for the court to determine which shall hold and occupy the office. Where there is but one candidate, or the certificate of the clerk shows that a candidate has received a majority of the votes, and is elected at a regular election, and there is no contest, nothing remains for the County Court to do but to issue the commission. They are, then, invested with no discretion, and have no judicial functions to perform. The case of *The State ex rel. Bartley v. Fletcher* (39 Mo. 388) is not parallel with this. There it was decided that the duty of the governor to issue a commission was a political power delegated by the constitution, not subject to revision in the courts; and that the executive, being a co-ordinate branch of the government, was not amenable to the judiciary when exercising his admitted authority.

The case is quite different here. The County Court is an inferior tribunal, over which, by the constitution and laws of the State, this court has supervisory control, and can compel it to act when it refuses to perform or proceed in the execution of a plain duty enjoined on it by law. Were this the only question in the record, the writ necessarily would have to be issued.

But the petition shows, and the fact is admitted, that the registration law was not complied with previous to the election. No new or supplementary registration was had whatever. The election was only for a judge of the Court of Common Pleas, and was a special as distinguished from a general election, within the meaning of the statute. But whether general or special, the result is the same, as it is a positive requirement that registration should precede the election. The act declares that the election for judge of the Court of Common Pleas shall be conducted in all respects in the same manner as may be provided by law for the election of members of the Legislature. It is obvious that there could be no valid election for a member of the Legislature without a prior registration. (Sess. Acts 1868, p. 131.)

This court will not issue a peremptory writ of *mandamus* unless the relator shows that he has a good title or a perfect right to the remedy he demands. He can derive no right from an illegal or invalid election.

McGlothlin, Adm'r, et al. v. Hemery et al.

There is force in the observation of the petitioner's counsel that if the registration officers refuse to perform their duty injustice may be done, and a party may be deprived of what he is fairly entitled to. But that would not justify a court in giving validity to a palpably illegal act, though the illegality occurred in consequence of the negligence, willful default, or even corruption of officers whose duty it was to perform a given function or execute a trust. The party aggrieved can not seek his redress in this manner.

This controversy has grown out of a difference of opinion entertained as to the tenure of the office of Common Pleas judge for Buchanan county. The question as to when the term commences and ends is not raised in the issue presented by the pleadings, and we can therefore give no decision upon it. The act establishing the court requires the election to take place in August. Whether that act has been modified or amended, so as to prescribe a different term, we do not know, as nothing has been presented on the subject.

For the reason that the requirements of the law as to registration were wholly neglected, the demurrer will be sustained. The other judges concur.

EPHRAIM MCGLOTHLIN, Adm'r of WALTER MOORE, *et al.*,
Appellants, v. JAMES HEMERY and REZIN HEMERY, Respondents.

1. *Practice, Civil—Pleadings*—"Plain and concise statement of facts," *what is meant by*.—The "plain and concise statement of facts" required by the statute does not refer so much to the style of the pleader—to his command of terse and simple English—as to the attempt sometimes made to give a long and prolix history of the transaction upon which the suit is based, and encumber the pleadings with a number of impertinent allegations.
2. *Administrator—Note secured by deed of trust—Sale of land under—Bill in equity to redeem—Usury—Tender*.—Where the amount due on a note secured by a deed of trust on real estate is tendered by the administrator of the original maker, and is refused, he may immediately afterward file his petition to redeem the land; and if it be sold under the deed after tender, he may still obtain an order to set aside the sale and redeem the property; and if

McGlothlin, Adm'r, et al. v. Hemery et al.

he needs the money to be derived from an administration sale of the land in order to pay the debts of the estate, he is a proper plaintiff in a bill for cancellation of the sale under the trust deed. If the amount called for by the trust note is in part usurious, the administrator, under section 4, chapter 89, Gen. Stat. 1865, may refuse to pay the usurious portion of it, and need only make tender of the balance.

3. *Practice, Civil—Pleading—Bill in equity—Multifariousness.*—Multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action. Distinct facts forming a series of transactions tending to a common end, or all necessary to plaintiff's equity, do not constitute multifariousness, nor does redundant or irrelevant matter that may be stricken out on motion, under section 20, chapter 165, Gen. Stat. 1865.
4. *Practice, Civil—Bill in equity—Prayer for relief.*—In a bill in equity, if the petitioner make a case which will entitle him to some relief in the power of the court to grant, although he may mistake as to the specific relief, he will not, in consequence, be turned out of court; much less, if he has one good specific request and a general prayer. All that portion of the prayer not warranted by the petition is a nullity, and should be treated as surplusage.

Appeal from Fifth District Court.

H. M. & A. H. Vories, for appellants, cited *Miltenberger v. Morrison*, 39 Mo. 71; *Sto. Eq. Pl.* §§ 402, 271 *et seq.*, also note 1 on page 265, and § 278, etc.; 19 Mo. 551; 37 Mo. 441.

Hall & Oliver, for respondents, cited Gen. Stat. 1865, p. 658, § 3; 36 Mo. 215; *Doan v. Holly*, 25 Mo. 359; *Hoagland v. Han. & St. Jo. R.R. Co.*, 39 Mo. 459; *Peyton v. Rose*, 41 Mo. 261; *Meyers v. Field et al.*, 37 Mo. 441; 42 Mo. 488; 17 Mo. 231; 20 Mo. 234; 29 Mo. 29.

BLISS, Judge, delivered the opinion of the court.

The plaintiff McGlothlin, as administrator, and the other plaintiffs, as heirs of Walter Moore, present to the Circuit Court of Caldwell county their petition to set aside the sale made to James Hemery, defendant, under a trust deed to Rezin Hemery, for his use, of certain lands belonging to said estate. They state in detail all the facts which they suppose entitle them to relief; and inasmuch as defendants have demurred upon the ground of insufficiency, multifariousness, misjoinder, etc., it is necessary to consider the petition somewhat in detail.

McGlothlin, Adm'r, et al. v. Hemery et al.

The plaintiffs allege that in October, 1858, the said Walter Moore borrowed of said James Hemery the sum of \$390, for which he gave his notes for \$450 at ten per cent. interest; and that afterward, on the 10th day of September, 1860, he gave a new note of \$1,216.87, for the money so borrowed and interest, when in fact but \$465.84 was then lawfully due for the principal and interest of the debt. At the same time, in order to secure said last mentioned note, the said Moore gave to said Rezin Hemery a trust deed of sundry parcels of land described in the petition, with power of sale, etc.; and on the 12th day of February, 1863, he died. On the 7th of March, 1864, the plaintiff McGlothlin, as administrator, paid said James Hemery, upon said debt, the sum of \$600; and afterward, on the 11th of September, 1865, tendered him the sum of \$200, which he refused to receive in satisfaction of the debt, but claimed a much larger sum. The petition alleges that there was actually due upon said indebtedness the sum of only \$33.19, which he brings into court for the defendant, but that he offered to pay the \$200 to save trouble to the estate, inasmuch as the note and mortgage called for a much larger amount. After the death of Moore, the plaintiff McGlothlin was appointed his administrator, which the defendants well knew, but the holder of the note never presented the same for allowance to the Probate Court; but the defendant Rezin Hemery, the trustee, at the request of James Hemery, on the 9th of November, 1865, sold to said James Hemery, under said deed of trust, a portion of the land embraced in it for the sum of \$1,305, and subsequently conveyed the same. The land so sold is described in the petition, and the petition charges that both the said James and Rezin, at the time of the sale, knew that only the sum of \$33.19 was due upon the debt, and that the sum of \$200 had been tendered and refused; also, that the claim had never been allowed against the estate.

The petition also sets forth that claims amounting to \$5,928 have been allowed against said estate, which are unpaid, and that the estate, in consequence of the sale under said deed of trust, has become insolvent; also, that the Probate Court of said county has made an order for the sale of the real estate of deceased for the

McGlothlin, Adm'r, et al. v. Hemery et al.

payment of his debts, which order covers the land embraced in the trust deed, including the land sold defendant James Hemery and other lands; but the petition avers that, in consequence of the cloud upon the title of the land bought in by James by virtue of the sale and deed to him, it will be sacrificed if sold under the order; and shows that no persons have any interest in said real estate except the creditors of the estate represented by the administrator, who is one of the plaintiffs, and the other plaintiffs, who are the heirs, the widow having had her dower assigned elsewhere.

The above is a brief summary of the allegations of the petition, though it sets them forth at much greater length. The prayer of the petition seems to us to have been the chief cause of the controversy in the case, and is as follows: "Plaintiffs therefore pray that it may be ordered, adjudged, and decreed by the court, that the said deed executed by the defendant Rezin Hemery, as trustee, to the defendant James Hemery, be canceled and held for naught; that the title to the land specified in said deed pass to and vest in the estate of Walter Moore, deceased, as if said deed had never been executed; that that land and other land belonging to the estate be sold by the plaintiff, Ephraim McGlothlin, administrator, as aforesaid, for the payment of the debts of said estate, or so much thereof as may be necessary, and that the title to the land not so sold for the payment of the debts of said estate pass to and vest in those of the plaintiffs who are heirs of said Walter Moore, deceased; and that the sum of thirty-three dollars and seventy-four cents be paid to the defendant James Hemery out of the proceeds of the sale of said land specified in said deed of trust, or that whatever other sum may be ascertained to be due to him as principal and interest at the rate of ten per cent. per annum on said indebtedness be paid to him out of such proceeds, and that the defendant, upon such payment, enter satisfaction of said deed of trust upon the margin of the record thereof; and the plaintiffs pray for such other and further relief as the nature of their case may require."

Defendants demur to the petition because it does not contain a plain and concise statement of facts; because it does not contain facts sufficient to sustain an action; because it unites two causes

McGlothlin, Adm'r, et al. v. Hemery et al.

of action in one count; because it is multifarious; and because it does not seek the right relief.

I can see no foundation for these claims. We must distinguish between the statement of the cause of action and the prayer for relief, and in looking carefully through the former I can not see upon what principle the demurrer can be sustained for the reasons set forth. The "plain and concise statement of facts" required by the statute does not refer so much to the style of the pleader—to his command of terse and simple English—as to the attempt sometimes made to give a long and prolix history of the transactions upon which the suit is based, and encumber the pleadings with a multitude of impertinent allegations. Courts always are pleased with simplicity and brevity of statement, but will never throw a party out of court if, in this regard, his pleading shows less culture and labor than characterizes the highest style of pleading. But if we were disposed to be critical, although in the stating part of this petition there are one or two unnecessary averments, we can not see any such want of clearness and precision as should distinguish it from ordinary pleadings.

Upon the second objection, "that it does not state facts sufficient to constitute a cause of action," the demurrant is equally lame. The plaintiffs make a complete case. The original debt has been nearly paid, and more than the balance was tendered before the property was sold. The amount due is brought into court for the use of defendants. The administrator has done everything in his power to redeem the land, and but one course is now open to him. He might have filed his petition to redeem immediately after the tender was refused, though the sale does not preclude him from doing it now. It simply imposes upon him the additional burden of obtaining an order to set aside the sale, as well as an order of redemption. All the allegations of title, or a right to come into court, are clear and distinct. The administrator needs the proceeds of the sale of the real estate to pay the debts, and hence he is a proper plaintiff, though ordinarily the heirs are alone interested in the realty. The demurrant can not sustain this objection unless upon the ground that the estate of decedent is bound by his note—that the administrator can not

McGlothlin, Adm'r, et al. v. Hemery et al.

refuse to pay the usury embraced in it—and that is not seriously pretended. Our statute upon interest makes no express provision in regard to redemption of mortgages and trust deeds, as it does when suit is brought upon an usurious instrument; but under the positive prohibition of section 4, the right of the debtor to refuse, whether sued or not, to pay over ten per cent. is clear.

Neither is the petition open to the charge of duplicity or multifariousness; all the facts set forth constitute but one cause of action. The unnecessary allegation, that the claim of Hemery was not presented for probate, in no way affects the general frame of the pleading, and may be disregarded. Nor, perhaps, can the statement that the Probate Court has ordered a sale of the property be deemed necessary; nor can I see the propriety of describing the sale under the trust deed as throwing a cloud over the title. It seems to me to be no cloud at all, but a complete eclipse. As to all outsiders, it was an absolute conveyance of both the legal and equitable title, and was subject only to the right of redemption by the plaintiffs.

But these unnecessary allegations do not subject the pleadings to the objections made by counsel. Multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action. Distinct facts forming a series of transactions tending to one common end, or all necessary to the plaintiff's equity, do not constitute multifariousness. (Sto. Eq. § 271, *a, b.*) Nor does redundant or irrelevant matter that may be stricken out on motion, under section 20, chapter 165, of the General Statutes. But these objections are probably not intended to be made to the body of the petition, but only to its prayer. That prayer, it is true, contains many requests which the court would not grant. It would grant the first prayer for the cancellation of the deed from the trustee to the creditor, and under the last and general prayer it should order a redemption of all the land embraced in the original deed of trust, upon payment of the balance of the debt. But the court would not make any specific order as to the legal effect of canceling the deed; and if it should order the sale of the land covered by the trust, it certainly could not order the sale of "other land belonging to the

State ex rel. Townshend, Adm'r, v. Meagher et al.

estate." It is the duty of a party coming into court to make a case that shall entitle him to some relief in the power of the court to grant, although in these equity cases he may mistake as to the specific relief to which the court shall think him entitled. But he will not, in consequence, be turned out of court; much less, if he has one good specific request and a general prayer. The latter will cover any other relief which is his due. All that portion of the prayer not warranted by the petition is a nullity, and should be treated as surplusage; but there is enough in the petition to sustain a redemption of the land, a setting aside of the sale and cancellation of the deed made by the parties to the usurious contract, after all and more than the amount due had been tendered to the creditors.

The judgment of the District Court is reversed and the cause remanded. The other judges concur.

STATE OF MISSOURI *ex rel.* E. TOWNSHEND, Adm'r, Plaintiff in Error, *v.* J. G. MEAGHER *et al.*, Defendants in Error.

1. *Administrator—Property stolen from—Not responsible for in equity.*—Where funds belonging to an estate are stolen from the executor or administrator while in his charge, he can not in equity be held liable; and in such case an equitable defense may be made to an action at law. The suit will be tried by a jury instead of the chancellor. But his right to the equitable defense remains. And he will be permitted to testify in his own behalf, under the statute (Gen. Stat. 1865, ch. 144, § 1), and independently of it, under the common law.
2. *Administrators are liable, for what care.*—Executors and administrators stand in the position of trustees of those interested in the estates upon which they administer, and are liable only for want of due care and skill; and the measure of care and skill required of them is the same as that demanded of bailees for hire, viz: that which prudent men exercise in the direction of their affairs.
3. *Bailee, care to be exercised by.*—The care to be exercised by a bailee over property in his charge must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto.
4. *Administrator—Competency of as a witness—Construction of section 1, chapter 144, Gen. Stat. 1865.*—Under section 1, chapter 144, Gen. Stat. 1865, where the testimony of one of the parties to the transaction, or cause of action,

State ex rel. Townshend, Adm'r, v. Meagher et al.

or matter of defense, was placed beyond reach by death or insanity, the testimony of the other party was shut out, so as to preserve, as far as possible, an equality of position between them, and for no other reason. And in respect to a case where property in the charge of an administrator, belonging to the estate, is stolen, no testimony being lost by reason of the death of the intestate, the administrator is not within the reason of the exceptions named in the section, and is not excluded from testifying because of it.

Error to Fifth District Court.

Vories & Vories, for plaintiff in error.

I. This suit is founded upon a contract, viz: the bond of the administrator. By the terms of that contract he is bound to pay over the money at all events, and public policy would forbid his discharging his obligation by showing that the money had been lost. This is the case with all officers who voluntarily assume a trust under a bond like the present. (*Haller v. The State*, 22 Ind. 125; *Thompson v. Board of Trustees*, 30 Ill. 99; *U. S. v. Prescott et al.*, 3 How. 578; 12 Cush. 144; *Commonwealth v. Cowley*, 3 Penn. St. 372; and cases cited in the foregoing cases.)

II. The personal property of the deceased, and all moneys coming into the hands of the administrator which belonged to the deceased, vest in the administrator, and become his property in law; hence he can not hold such money as a bailee. (*Henry, Adm'r of Doty, v. Dutcher*, 15 Mo. 89; *Abbott v. Miller*, 10 Mo. 141; *Thomas v. Relfe*, 9 Mo. 373; *Lacompte v. Seargent*, 7 Mo. 351; *Hall v. Harrison*, 21 Mo. 227.)

III. The exception in the statute (*Gen. Stat. 1865, ch. 144, § 1*) includes such a case as this.

Harlan, and Kelly & Giddings, for defendant in error.

I. Exceptions to general rules are to be strictly construed; and, in this case, unless the evidence offered comes clearly within the exceptions named in section 1, chapter 144, *Gen. Stat. 1865*, it ought to have been admitted. (40 Barb. 537; 45 Barb. 397; 20 Ind. 513, 264; 24 Ind. 68; 23 U. S. Dig. 597-98; 24 Ind. 656.) Meagher was clearly a competent witness within the intention and spirit of the law.

State ex rel. Townshend, Adm'r, v. Meagher et al.

II. The property, money, and effects of the decedent do not belong to the executor or administrator in his own right; he holds them in trust for the heirs and creditors. (32 Mo. 481; 23 U. S. Dig. 256, § 24; 2 Am. Ch. Dig. 575 *et seq.*; 36 Penn. St. 174; 21 U. S. Dig. 257; 33 Barb., N. Y., 327; 21 U. S. Dig. 257, § 40.) He is simply a trustee, and is not to be held responsible as an insurer. Good faith and ordinary diligence and care are all that are required of him; and if the moneys or effects of the estate be lost or stolen, where he has exercised ordinary care, he is not liable. (3 Abb. N. Y. Dig. 88, § 293; *id.* 89, § 305; 7 *id.* 303, § 33; 3 Lead. Cas. in Eq., 3d ed., Hare & Wallace's notes, pp. 441, 445, 468; 4 J. C. R. 619; 45 Barb. 192; 4 Johns. 446; 31 How. Pr. 55; 1 Caines, 96.) The law of bailment, so far as the matter of diligence and negligence are concerned, is applicable to executors and administrators (3 Lead. Cas. in Eq. 445); and the administrator was only bound to use ordinary diligence. (Sto. on Bail. §§ 398, 399, 400; Edw. on Bail. 276-7; 2 Kent, 565, 578, 581; 2 Pars. on Cont. 130, 156; Sto. on Bail. § 399.)

CURRIER, Judge, delivered the opinion of the court.

In February, 1866, the Andrew County Court granted letters of administration on the estate of Robt. M. Cowan, deceased, to the defendant Meagher, who executed his bond as administrator, with the other defendants as sureties, for the performance of his duties in that relation. He thereupon assumed charge of the estate, and disposed of so much of it as to realize the sum of \$1,807.50. On the 15th day of October following, his letters of administration were revoked, and the plaintiff, Townshend, as public administrator, was put in charge of the estate. This suit is brought upon the administration bond to recover the balance of moneys alleged to remain in the hands of the outgoing administrator.

The answer admits the receipt of the \$1,807.50 as charged in the petition, but alleges, in the way of defense, that \$1,700 of said money was forcibly stolen and taken from the possession of

State ex rel. Townshend, Adm'r, v. Meagher et al.

said Meagher, about the 9th day of September, 1866, by thieves, without his fault or neglect, and which said theft he could not prevent.

The replication puts the allegations in regard to the \$1,700 in issue, and upon these issues the trial was had.

On the trial, Meagher was offered as a witness in his own behalf, and was excluded by the court, exception thereto being taken. An exception was also taken to one of the instructions given for the plaintiff, in whose favor the trial resulted.

Going back of the questions at the trial, however, the counsel of the plaintiff has insisted, in this court, that the facts alleged in the answer constitute no defense to the suit; that an administrator can alone be discharged from the obligation of his bond by producing the property or paying over the money that has come to his hands. In support of this view we are referred to a number of authorities, such as *The United States v. Prescott et al.* (3 How. 578), where the suit was upon the bond of a public officer holding public funds, and where it was held that the obligation of the bond was absolute, and that nothing short of the actual paying over of moneys which came to the possession of the officer would satisfy that obligation.

The obligation of the bond in suit is clearly different from that, for it is well established equity law that, under certain circumstances, executors and administrators are absolved from responsibility, notwithstanding the bond, and notwithstanding the failure to produce the property or pay over its value in money—as where the property has been taken by the public enemy, or has been lost through unavoidable accident, or, in case of animals, where they have perished from disease—no negligence being imputable to the administrator or executor. (2 Williams on Executors, 142, and cases there cited.) The obligation of the bond, therefore, in such cases is not absolute.

The condition of the bond under consideration is that the administrator shall pay over and account for the money and property that should come to his hands, belonging to the estate, as “required by law;” and the question remains, in a case like the present, what does the law require? In *Cross v. Smith*

State ex rel. Townshend, Adm'r, v. Meagher et al.

(7 East. 251), Lord Ellenborough, C. J., holds the following language: "As no case at law has yet decided that an executor, once become fully responsible by actual receipt of a part of the testator's property for due administration, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of a testator's assets, either on the score of inevitable accident—as destruction by fire, loss by robbery, or the like—or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in case of loss without any negligence on their part; I say, as no such case in respect to executors has yet occurred in a court of law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favor of the defendant." This was in 1806; and I find no subsequent case, English or American, where such precedent has been established in a court of law.

The rule in equity is different, however, as is shown by a long and uniform course of decision, although but few of them involve the particular question of the loss of money by theft or robbery. In *Forman v. Coe* (1 Caines, 96), it is assumed that robbery of trust funds in the hands of an executor, in equity, exonerates him from accountability; and that he is, from the necessity of the case, a competent witness in his own behalf. This was a case of robbery, as distinguished from theft, committed by a company of soldiers, on Long Island, in the time of the war of the revolution.

Redfield, in his work on Wills, part 2, p. 881, states the law in regard to the robbery of trust funds thus: "If the trustee is robbed of the trust money without his fault, he is not responsible; and he may, in ordinary cases, exonerate himself by his own oath, as he can not be expected to produce any other proof." *Morley v. Morley*, 2 Ch. Cas. 2; *Knight v. Lord Plimpton*, 3 Atk. 480; and *Jones v. Lewis*, 2 Ves. 240, are cited as authorities supporting the text.

In the *Morley* case the defendant was trustee for the plaintiff, an infant, and received for him £40 in gold, of which he was robbed by his own domestic servant, together with £200 of his

State ex rel. Townshend, Adm'r, v. Meagher et al.

own money. The Lord Chancellor allowed the trustee this £40 on his own oath. (See 3 Chit. Eq. Dig. 2934.) This would seem to have been a case of theft, technically, although it is spoken of as a robbery. The case in *Atkyns* does not involve the question of theft or robbery, but a question of care and prudence in remitting funds to London by a court receiver, in bills of exchange.

The facts in the case reported in 2 Vesey were that the administratrix had placed certain goods in the hands of her solicitor, from whom they were stolen. In regard to the case, Lord Chancellor Hardwicke said: "It is certain that if a bailee of goods, against whom there is an action of account at law, loses the goods by robbery, that is a discharge in an action of account at law; and it is proved (and, I think, reasonably) that if a trustee is robbed, that robbery, properly proved, shall be a discharge, provided he keeps them so as he would his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands, and for these not to be charged unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be charged, at least not in this court."

In 2 Williams on Executors, 1419-20, it is said: "But it should seem, at least in a court of equity, that an executor or administrator stands in the condition of a bailee, with respect to whom the law is that he should not be charged without some default in him. Therefore, if any goods are stolen from the possession of the executor, or from the possession of a third person to whose custody they were delivered by the executor, the latter shall not, in equity, be charged with these as assets." Jones v. Lewis (2 Ves.) and other authorities are cited in support of that doctrine; see, also, p. 1538. So, in the Law of Trusts and Trustees, by Tiffany & Bullard, p. 583, the principle is stated thus: "Where an executor has been robbed of money belonging to the estate, without any fault of his own, he will not be held responsible." The result is that executors and administrators, according to the decided cases and the views of eminent law writers, stand in the position of trustees of the persons who are interested in the estates upon which they administer, and that

State ex rel. Townshend, Adm'r, v. Meagher et al.

they are subject to liability only for want of due care and skill, and that the measure of care and skill required of them is the same as that demanded of bailees for hire, namely: that which prudent men exercise in the direction of their affairs. To exonerate this class of trustees from liability on the ground of the theft or robbery of trust funds in their hands might at first seem to hazard the just security that ought to be thrown around estates, and to facilitate fraudulent practices on the part of corrupt executors and administrators. The experience, however, of the last hundred years, in this country and England, does not indicate that the rule works injuriously in this direction, or that it serves to induce cases of simulated theft or robbery. It is quite remarkable that so few cases have arisen where questions of this character have come up for adjudication. Besides, the holding of trustees to responsibility for trust funds in a plain case of theft or robbery, against which the watchfulness of a prudent man could not guard, would have a tendency to deter men of prudence and care from assuming such relations and responsibilities—thus leaving these funds to fall into the hands of less careful and scrupulous persons, and to a consequently increased hazard. On the whole, we are disposed to accept the law, as laid down in the adjudicated cases referred to, as satisfactory.

Under our system of practice, an equitable defense, which this is, may be made to an action at law. The change of system, in this instance, leads to a change of the trier of the questions of fact involved, substituting a jury in place of the chancellor; and what is due diligence is frequently more a matter of fact than a question of law. Practically, therefore, the relief which, in a case like the present, has been confined to a court of chancery, to be adjudged and disposed of according to the rules and principles of equity practice, is transferred to a court of law, involving a jury trial. But this circumstance does not warrant a modification of the existing rules governing the accountability of executors and administrators in respect to trust funds alleged by them to have been lost by theft or robbery through no fault of theirs.

On looking into the evidence preserved in the record in this case, it appears that the money alleged to have been stolen was

State ex rel. Townshend, Adm'r, v. Meagher et al.

placed by the defendant Meagher in his pocket-book, and thus deposited in a drawer of a bureau standing in a vacant room of the house where he resided, the room being but indifferently secured against the entrance of burglars. It also appears that thieves were infesting that part of the country at that time. Under such circumstances, the leaving of a considerable sum of money in the situation stated, is suggestive rather of culpable negligence than a high degree of care and prudence. It might be prudent enough to leave ordinary apparel in that situation. The fact, however, that the property in question was not clothing, but money, changes the character of the case. That which would be ordinary care in the security and preservation of wearing apparel might be gross carelessness in the disposition of bank bills. The care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto. (Sto. on Bail. §§ 15, 186, and cases cited.) Under the civil law, the fact of theft was itself deemed presumptive evidence of carelessness or fraud on the part of the bailee of the lost property.

The foregoing exposition of the law governing the liability of executors and administrators, in reference to the trust funds in their custody, disposes of the objection urged against the sufficiency of the defense set up in the answer, and also, incidentally, of the objection taken to the competency of Meagher as a witness, which is the other principal point in the case; since, as we have seen, parties situated as he is are permitted to testify in their own behalf from the supposed necessity of the case, independently of any statutory regulation on the subject. But Meagher is a competent witness by virtue of the provisions of the statute. (Gen. Stat. 1865, p. 586, § 1.) It was the manifest purpose of the Legislature, in this enactment making parties witnesses, to preserve as far as practicable an equality of position between them. Therefore the living were not permitted to testify in respect to acts and transactions had with persons since deceased, or who had become insane; and for the reason that the testimony of the opposing party to the transaction, or cause of action, or

Mechanics' Bank v. Pitt et al.

matter of defense, could not be had. This, indeed, runs through the entire proviso, including both exceptions, and constitutes the entire scope and substance of it. In cases where the testimony of one of the parties to the transaction, or cause of action, or matter of defense, was placed beyond reach by the causes stated, the Legislature very wisely shut out the testimony of the other party; and for that and no other reason. That seems evident on the face of the statute. In respect to the defense set up in this suit, there is no loss of testimony through death or insanity or other causes contemplated in the enactment. Meagher is clearly not within the reason of the exception, and he is not excluded from testifying because of it. As his testimony was improperly ruled out, the case must go back for a fresh trial. The instruction excepted to is subject to verbal criticism, although it puts the law to the jury with substantial accuracy.

The judgment of the District Court reversing the judgment of the Circuit Court is therefore affirmed, and the case remanded for trial in accordance with this opinion. The other judges concur.

MECHANICS' BANK, Plaintiff in Error, v. JOHN E. PITT *et al.*,
Defendants in Error.

1. *Sale—Sheriff's return—Memorandum indorsed on—Inadequacy of price—Sale set aside, when.*—Where the sheriff's return upon an execution which had been levied upon certain shares of stock showed neither an advertisement nor public sale of the stock; and the only evidence of a sale at all was a mere memorandum or calculation of a sum of money made by some sale, indorsed on the back of the execution, and the price shown to be realized was greatly inadequate, the sale would be properly set aside on motion.

Error to Fifth District Court

Doniphan, for plaintiff in error.

Woodson, and *Vinyard & Young*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiff's branch at Weston sold all its assets to the Platte Savings Institution, among which was a judgment in the Platte

 Mechanics' Bank v. Pitt et al.

Circuit Court against defendant Pitt and his securities, for about \$1,000. Three executions were issued upon the judgment at the instance of the Savings Institution, upon one of which levy was made upon a number of parcels of land. The second execution was issued April 25, 1865, to the sheriff of St. Louis county, by an indorsement upon which it appears that on the 29th of April he levied upon thirteen shares of stock of this Western Branch as the property of Pitt. There is no indorsement of advertisement or sale, but instead of it the following memorandum:

"Made by sale, May 11, 1865.....\$130 00
 Cost taxed.....\$39 70
 Advertising..... 7 00
 Ser. and Com. and Copies..... 9 05—\$ 55 75—\$74 25
 "Which leaves \$74.25 to be applied on this debt," etc.

A third execution was issued, upon which this \$74.25 was applied, and the balance paid in cash. It does not appear when the execution issued to St. Louis county was returned, but at the September term, 1865, of the Circuit Court of Platte county, defendant Pitt filed his motion to set aside the sale made under it. The chief ground relied on is the irregularity of the sale—that it was made without advertisement or notice according to law. Testimony was submitted for and against the motion, tending to show some management to get possession of the bank stock at less than its value; and it appears that before the sale an offer by the Savings Institution of 80 per cent. for the stock, theretofore made and refused, was accepted by Pitt, and, through the agents of the bank and Institution, a power of attorney was sent to Mr. Burns, of St. Louis, to transfer it, but it arrived the day after the sale. It also appeared that the execution was issued for the use of the Savings Institution, and that the stock was bid in by its agent. The Circuit Court sustained the motion to set aside the sale, and the District Court affirmed its action.

This matter is relieved of the embarrassment often attending matters of this kind by the intervention of the rights of third parties. No innocent purchaser can lose by the action of the court, and the Circuit Court was justified in acting upon irregularities less flagrant than if outsiders were thereby to suffer. The

State Bank of Missouri v. Tutt, Adm'r.

return of the sheriff of St. Louis county does not show that he complied with the law in the sale of this stock. It shows neither an advertisement nor a public sale; and that there was any sale is a mere inference of a memorandum or calculation of what was made by some sale. Indeed, it can hardly be supposed that at a public sale, in the city of St. Louis, of stock of an institution so well known as the Mechanics' Bank, and worth, as appears, at least eighty cents on the dollar, only twelve cents could be obtained.

There were other circumstances connected with the conduct of the parties in interest and purchasers, tending to influence the action of the Circuit Court, and we are not disposed to interfere with that action. The other judges concur.

STATE BANK OF MISSOURI, Appellant, v. HENRY TUTT, Adm'r,
Respondent.

1. *Administrator — Judgments presented more than one year after death, classed how.*—Judgments exhibited against the estate of a deceased person in the Probate Court, more than a year after his death, under section 1, chapter 123, Gen. Stat. 1865, should be placed in the sixth and not in the fourth class. The term "all demands," spoken of as belonging to the fifth class, means "all demands except judgments;" and the same term, when it refers to those embraced in the sixth class, means "all demands, including judgments," and, perhaps, also those named as belonging to the first and second classes. Sections 2 and 11, *et seq.*, chapter 124, and section 29, chapter 123, Gen. Stat. 1865, clearly show that no demand requiring presentation and allowance can be placed in or forward of the fifth class unless presented within the year.

Appeal from Fifth District Court.

Bassett & Van Waters, for appellant.

H. M. & A. H. Vories, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff presented to the Probate Court of Buchanan county, for allowance, a demand against defendant's estate, founded upon a judgment rendered during the life of decedent;

State Bank of Missouri v. Tutt, Adm'r.

and, upon hearing, the sum of \$1,221.61 was allowed, and the same was assigned to the fourth class. The judgment having been presented and notice given more than one year after the granting of letters, the administrator appealed from so much of the decision as assigned the demand to the fourth class; and the Circuit Court sustained the holding of the Probate Court, but its decision was reversed in the District Court.

The assignment of the judgment to the fourth class was clearly wrong, though the language of section 1, chapter 123, General Statutes, is not quite as explicit as it might be made. The fourth class is made to include "all judgments rendered against the deceased in his lifetime," without reservation; the fifth class embraces "all demands, without regard to quality," exhibited within one year; while in the sixth class are included "all demands thus exhibited after the end of one year," etc. The Probate Court held that the fourth class included all judgments, without regard to the time of the presentation, and that the other classes had no relation to judgments. But we can only harmonize this section with the other requirements of the statute by holding that the term "all demands," spoken of as belonging to the fifth class, means "all demands except judgments;" and the same term, when it refers to those embraced in the sixth class, means "all demands, including judgments," and, perhaps, also those named as belonging to the first and second classes.

Section 2 of chapter 124 requires a settlement by administrators every year, and other sections provide for enforcing such settlements by citation, attachment, fines, etc. Sections 11 and following provide that the court, at every settlement, shall ascertain the amount of money that has come into the hands of the administrator, and the amount of debts allowed against the estate, and order the amount to be apportioned among the creditors, and shall so proceed "until all the debts be paid or the assets exhausted;" and if, upon such settlement, there is enough to pay all demands of one class, the court shall order the whole to be paid. Provision is also made for enforcing these orders in a summary manner. Section 29, chapter 123, expressly requires that the administrator shall pay the demands against the estate

Matson v. Calhoun.

in the order in which they are classed, and forbids the payment of any demand of one class until all previous classes are satisfied.

These provisions clearly show that no demand requiring presentation and allowance can be placed either in or forward of the fifth class unless presented within the year. The administrator is required to settle at the end of the first year, and show the assets in his hands. It is the duty of the court to order distribution among the creditors or payment in full, according to classification. Under this order, the claims belonging to the first five classes may be paid and the assets exhausted. All the claims embraced in the fifth class are in and are paid, if the money will go so far. Afterward, and within the second year, a judgment is presented, and is assigned to the fourth class. At the next annual settlement the court must order it to be paid; and it must be paid before any payments are made upon the fifth class. But there are no assets, and the fifth-class debts are already paid under an order of court imperatively required by statute, and nothing is left but for the administrator to pay it out of his own estate. The statute can never be construed to work such injustice; and judgments, as well as other debts not presented until after the first year, must be placed in the sixth class. This classification has nothing, however, to do with the liens which any judgment may have.

The judgment of the District Court is affirmed. The other judges concur.

WILLIAM MATSON, Appellant, v. SAMUEL P. CALHOUN, Respondent.

1. *Practice, Civil—Actions—Trove—Mistake in boundary lines—Fence rails.*—A rail fence, built with the intention of dividing the lands of A. and B., was, by miscalculation, placed inside of B.'s boundary line. Suit being brought for the value of the rails, the court properly held that if the proof showed the mistake in placing the fence, and the license and permission of plaintiff to build it inside his line, and its removal by defendant to the true dividing line in a reasonable time after the error was discovered, the jury should find for plaintiff. The mere erection of the fence upon plaintiff's land did not operate to vest the title thereto in him.

Matson v. Calhoun.

Error to Fourth District Court.

G. D. Burgess, for appellant.

Improvements and buildings erected on the land of another become the property of the land-owner. (1 Washb. on Real Prop. 4; *Crest v. Jack*, 3 Watts, Penn., 239; *West v. Stewart*, 7 Penn. St. 122.) And defendant in this suit was guilty of trespass in throwing down the fence and removing the rails. (2 Greenl. Ev. § 617; 28 Mo. 556.) This is so, even if the fence had been placed there by a license from plaintiff. (*Prince v. Case*, 2 Am. Lead. Cas. 527; *Benedict v. Benedict*, 5 Day, 464-9.)

A. W. Mullins, for respondent, cited *Chouteau et al. v. Goddin et al.*, 39 Mo. 250, 251, and cases there cited; *Fuhr v. Dean*, 26 Mo. 116; *Miller v. Platt*, 4 Duer, N. Y., 284; *Walter v. Post*, 4 Abb. N. Y. Pr. 389; 2 Am. Lead. Cas. 753; 6 Hill, N. Y., 61; 2 Seld., N. Y., 279; 2 Hare & Wall. Am. Lead. Cas. 748.

CURRIER, Judge, delivered the opinion of the court.

These parties were adjoining land-owners. In 1858 the defendant erected a rail fence upon a line dividing his lands from the lands of the plaintiff, as he supposed and believed. A subsequent survey, however, disclosed the fact that the fence was built upon the plaintiff's land, a rod or more from the true line of division separating the two lots. The defendant thereupon removed the fence back to its true position. The fence having been built upon the plaintiff's lands, he claims the rails composing it as his property, and sues for their value. The defendant claims to have placed the fence where it was originally constructed, with the knowledge and upon the license and permission of the plaintiff, and sets up these facts in bar of the action. Issue was joined on these averments. The trial resulted in a verdict for the defendant, and the plaintiff brings the case here by successive appeals.

At the trial the plaintiff asked instructions based on the theory that the erection of the fence upon the plaintiff's land operated to vest the title thereto in him. These instructions were refused;

Huxley v. Hartzell.

and the court instructed the jury, at the instance of the defendant, to the effect that if they found from the evidence that the fence was originally placed on the plaintiff's lands through mistake, and upon the license and permission of the plaintiff, and that the defendant removed it back to the true line in a reasonable time after the error was discovered, his acts therein were justifiable, and that the verdict should be in his favor.

This, for substance, is the error complained of. The plaintiff's theory of the law is not well founded. The principle adopted by the court is legally correct, applicable to the case, and grounded upon considerations of the clearest equity and justice. (See 1 Washb. on Real Prop., 3d ed., p. 542, § 2; Smith v. Goulding, 6 Cush. 155; Fuhr v. Dean, 26 Mo. 116; Chouteau v. Goddin, 39 Mo. 229.)

The other judges concurring, the judgment is affirmed.

P. A. HUXLEY, Respondent, v. CONRAD HARTZELL, Appellant.

1. *Practice, Civil—Actions—Trove—Refusal to deliver without lawful reason—Conversion.*—Although a refusal to deliver property on demand does not constitute a technical conversion, it is *prima facie* evidence of it, and will be conclusive in the absence of all evidence to explain and justify the refusal. And where the refusal is qualified by certain conditions, but there is nothing to show that the qualification rests upon a legal basis, the refusal is nevertheless conversion.
2. *Practice, Civil—Actions—Bailment—Property stolen—Proper diligence.*—In an action of trover for a certain belt and its contents, where defendant was bailee without reward, the mere fact that it may have been stolen while in defendant's keeping, without his knowledge, is no defense. To excuse its non-production, it must appear that it was lost without defendant's negligence or fault.

Error to Fifth District Court.

The instructions refused plaintiff, referred to in the opinion of the court, are as follows:

1. If the jury believe from the evidence that plaintiff delivered to the defendant, who was then in his employment as his servant or clerk, a belt with its contents, to be by him kept, and re-delivered on demand to plaintiff, and that plaintiff afterward demanded

Huxley v. Hartzell.

said belt and contents from defendant, who refused, without lawful excuse, to deliver the same to him, then they will find for the plaintiff.

9. If the jury believe from the evidence that defendant, after he received from plaintiff said belt and contents, refused to deliver the same to plaintiff on the ground that he would keep it until the plaintiff made a settlement with him, then such demand and refusal is evidence of a conversion of the same to defendant's use, and the jury will find for the plaintiff unless they further believe from the evidence that it was placed out of defendant's power to deliver the same, in consequence of plaintiff or his agents taking said belt and contents.

The seventh instruction, given for defendant, was as follows:

7. If, at the time of demand, the jury should believe that said belt had been stolen by some third person without the knowledge of defendant, then the jury will find for defendant.

Bassett & Van Waters, and *Strong & Chandler*, for appellant.

I. A refusal to deliver goods when demanded is not *per se* a conversion, but merely evidence thereof. (28 Barb. 75, 515; 17 U. S. Dig. 573, § 17.)

II. When a party, at the time of his refusal, had it not in his power to deliver up the goods demanded, the refusal is no evidence of conversion. (6 Barb., N. Y., 443; 1 Comst. 522; Sto. on Bail. 27, 100.)

Ensworth & Vories, for respondent, cited *O'Donoghue v. Corby*, 22 Mo. 393; 2 Hill. on Torts, §§ 12, 13, and citations therein; 22 Mo. 393; 1 Cow. 322; 2 Mass. 398; 2 J. J. Marsh. 86, 97; 7 Johns. 172, 254; 1 Comst. 524, and citations; 8 Johns. 445; 2 Greenl. Ev. 622, § 142; *Espmasse's Nisi Prius*, 245, 254; 1 Johns. 401; 2 Johns. 411.

CURRIER, Judge, delivered the opinion of the court.

This is an action of *tort*, founded upon an alleged conversion of personal property. It is brought to recover the value of a

Huxley v. Hartzell.

buckskin belt and contents, alleged to be of the value of some \$700. On the trial it appeared that the plaintiff, in March, 1864, delivered the belt and contents to the defendant for safe-keeping, to be returned when called for. Evidence was given tending to show that the plaintiff, a day or two subsequent to the delivery, demanded a return of the property. This request the defendant refused to comply with unless the plaintiff would first adjust some demand which he claimed to have against him. On this point the defendant testified as follows: "I designed to keep the belt till we could complete a settlement we had not time to make on the Saturday night previously [to the demand]. Huxley stated that he wanted to use some of the money the belt contained. I told him that he could have the belt just as he gave it to me as soon as he complied with the payment of the money he owed me." The plaintiff testified that when he made the demand the "defendant replied that he had it [the belt] safe, but he had concluded to keep it and its contents until I [the plaintiff] settled with him to his satisfaction."

It thus appears from the testimony of the parties, which is not conflicting on this point, that the plaintiff duly demanded his property; that the defendant, at the time, had it safe in his possession; and that he refused to give it up unless the plaintiff would first pay and satisfy a certain demand which the former claimed to have against the latter. Had the defendant a right to impose this condition? That would seem to be the material question in this case. For, although a demand and refusal do not in themselves constitute a technical conversion, still, they are *prima facie* evidence of it, and will induce a jury to find the fact in the absence of all evidence to explain and justify the refusal. (Lockwood v. Bull, 1 Cow. 392.) The law covering the point is clearly put by Leonard, J., in O'Donoghue v. Corby, 22 Mo. 396, thus: "It is true, a demand and refusal is not a conversion, but only evidence of one; and the reason is, the party may have a lawful reason for what he did. Here, however, he states the reason; and as it is altogether insufficient, this refusal is without lawful excuse, and therefore, without anything more, a conversion of the property to his own use." In that case the defendant

State of Missouri ex rel. Winburn et al. v. Minor et al.

made a qualified refusal, but the qualification was held unavailing because it was of such a character that it furnished no legal justification of the act.

So here, the defendant qualified his refusal, but there is nothing to show that the qualification rested upon any legal basis. It furnished no lawful excuse for the refusal. In this view of the subject, the plaintiff's first and ninth instructions taken together presented a substantially correct exposition of the law applicable to this branch of the case, although possibly subject to verbal criticism. Their refusal was error. The seventh instruction given for defendant presents a false principle of law, and is also bad as not being sustained by the evidence. There is no evidence tending to show that the belt had been stolen at the time the original demand was made. The plaintiff testified that the defendant admitted that the belt was safe in his custody when the demand was made, and the defendant fails to contradict him. If the defendant was bailee of the belt without reward, he was nevertheless bound to exercise reasonable care in its safe-keeping. The mere fact that it may have been stolen without his knowledge is not a defense. To excuse its non-production, it must appear that it was lost without defendant's negligence or fault.

The action of the District Court reversing the judgment of the Common Pleas Court is affirmed. The other judges concur.

STATE OF MISSOURI *ex rel.* L. C. WINBURN *et al.*, Plaintiffs in Error, *v.* JAMES J. MINOR *et al.*, Defendants in Error.

1. *Sheriff—Collections by—Statute of limitations begins to run, when.*—The cause of action on the bond of a sheriff for failing to account for moneys collected by him does not accrue, so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties in interest, or until the officer has made a proper return or report to the court ordering the sale, of the moneys realized therefrom.
2. *Sheriff, duties of in collection of moneys.*—The liability of a sheriff for moneys collected on sales in partition is substantially the same as for moneys collected on execution. In either case it is his duty to report or make return of his proceedings into court.

State of Missouri ex rel. Winburn et al. v. Minor et al.

*Error to Fifth District Court**Vories and McFerran*, for plaintiffs in error.

I. The Circuit Court erred in instructing the jury that the cause of action accrued at the time of the collection of the money sued for. (R. C. 1855, p. 751, § 67; Gen. Stat. 1865, p. 648, § 65, pp. 614-15, §§ 34-5, 38-40; 4 Blackf., Ind., 775; *Weston v. Ames*, 10 Metc. 244; *Fuqua v. Young*, 14 La. An. 216; *Collis v. Bowen*, 8 Blackf. 262; 20 U. S. Dig. 644, § 209; *Hutchins v. Gilman*, 9 N. H. 359; *Governor v. Stonum*, 11 Ala. 679; 8 U. S. Dig. 263, § 52; 3 Blackf. 324; *Wright v. Hamilton*, 2 Bailey, 51; 2 U. S. Dig. 357, § 209; *Church v. Clark*, 1 Root, 303; *Wright v. Hamilton*, 2 Bailey, 21; 2 U. S. Dig. 807-8, § 333; *Hyman v. Gray*, 4 Jones, Laws of N. C., 155; 18 U. S. Dig. 506, § 159; *State v. Blackwell*, 20 Mo. 97; *Rathbun v. Ingalls*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 376; *Rabsuhl v. Lack*, 35 Mo. 316.)

II. The failure of the defendant in error Minor to report the money collected, or to pay the same to the plaintiff in error, was not a breach of official duty, within the meaning of the statute of limitations; and no cause of action accrued to the plaintiff in error until suit was brought in absence of a demand. (*Kerns v. Schoonmaker*, 4 Ohio, 331; R. C. 1855, p. 1048, § 4.

Richardson, and *Hall & Oliver*, for defendants in error.

I. If at all in this case, the cause of action accrued when defendant Minor collected the money charged, and failed or refused to pay the same over to the parties entitled to it. (*Howell v. Young*, 5 Barn. & Cress. 456, 457; 3 Barn. & Ald. 288, 626.)

II. Although defendant Minor collected the money charged, and never paid it to the parties entitled to it, no cause of action accrued to them against defendants unless they had, within three years from the time when Minor collected the money, made demand for it; otherwise, the sureties are not liable.

CURRIER, Judge, delivered the opinion of the court.

This suit was instituted March 23, 1867, and is founded upon the bond of the defendant Minor, as sheriff of Daviess county,

State of Missouri ex rel. Winburn et al. v. Minor et al.

the other defendants being his sureties therein. The main question litigated in this court arises upon the answer of the defendants setting up the statute of limitations as a bar to the suit. The breaches of the bond averred in the petition consist in this: that Minor, as sheriff of said county, neglected to make collection of certain notes taken by him on the sale of lands in a partition suit; that he collected money therein which he never paid over or accounted for; that he wholly failed to make any report of his proceedings therein to the court having jurisdiction of said cause, as by law it was his duty to do.

Without going into the details of the case, or into a minute examination of the pleadings, it is sufficient to observe that it appears from the case that Minor, as sheriff, under the order and judgment of the Circuit Court of Daviess county, in 1859, in a partition suit there pending, sold the lands (the subject of said suit) on a short credit, receiving the notes of the purchasers of the lands as security for the purchase money; that on and prior to March 10, 1861, he had collected on these notes the sum of \$1,356.50 and the interest thereon; and that he never at any time made any return or report of these collections to the court or to the plaintiffs, who were the parties interested therein. Nor was any demand for payment made upon him until this suit was brought.

Upon this state of facts it is claimed by the defendants that the plaintiffs' cause of action accrued at the date of the collections, which was prior to March 10, 1861, and that the statute of limitations then commenced running. Upon this assumption it is further insisted that the action is barred—the cause of action, according to this view, having accrued more than three years prior to the commencement of the suit. The point to settle in the case is, when did the cause of action accrue? The liability of the sheriff for moneys collected on sales in partition is substantially the same as for moneys collected on execution. (R. C. 1855, p. 1116, §§ 35–6; Gen. Stat. 1865, p. 614, § 35.) In either case it is his duty to report or make return of his proceedings to the court.

As to the time when the liability of the sheriff attaches for neglect to account for moneys collected on execution, and a consequent right of action accrues against him, the decisions of the

State of Missouri ex rel. Winburn et al. v. Minor et al.

courts of the different States are variant. In Massachusetts it is held that the cause of action does not accrue till demand of payment is made upon him, and, consequently, that the statute of limitations only then commences running. (*Weston v. Ames*, 10 Metc. 244.) So also in Louisiana and Connecticut, and various other States. (14 La. 216; 1 Root, 303; U. S. Dig. 644, § 209.) But in Georgia it is held that the action accrues and that the statute commences to run in favor of the sheriff from the time the money was received by him on the execution (9 Ga. 413; Ang. on Limit. § 142, in note); while in Alabama the holding is that the cause of action accrues and the running of the statute commences from the time the fact of the collection is made to appear by the return of the execution satisfied. (*Governor v. Stonum*, 11 Ala. 679.) Much difficulty has been experienced in determining the time of the accruing of an action, with reference to the defense of the statute of limitations. The Massachusetts rule may place the subject too much in the control of the creditor, and lead to a frittering away of the protection designed by the statute to be thrown around officers and their sureties; while the Georgia rule goes as far in the opposite direction. The Alabama rule appears to us to be the better one; and, as the question is open for adjustment, we are inclined to adopt that rule here. It is the duty of the sheriff, on collecting money upon execution, to return the execution in due time into court, satisfied in whole or in part. So, in collecting money under a sale in partition, it is his duty to make return thereof according to the order under which he acts, that the same may be distributed among the parties entitled thereto. If he neglects this most reasonable duty, and fails to make such return, and thereby, so far as his omissions of duty serve to accomplish the result, keeps the parties and the court in ignorance of the true state of the case, it is not perceived that he has any just ground of complaint—that the statute of limitations should in the meanwhile be inoperative to shield him from the demands of an execution creditor, or of those who are entitled to the money proceeds of a sale in partition.

We are therefore disposed to hold that in a case like the present the cause of action does not accrue, so as to put in motion the

 Gillihan, Public Adm'r, v. Wren et al.

statute of limitations, until there has been either a demand of payment by the parties in interest, or until the officer has made a proper return or report to the court ordering the sale, of the moneys realized therefrom. In this view of the subject, the judgment of the court below must be reversed. The court, at the instance of the defendants, instructed the jury that if the relators failed to make demand of payment of Minor of the moneys collected by him in the partition proceedings "for more than three years after it was so collected, then the sureties in the bond are not liable therefor." This instruction, in effect, directed the jury that the cause of action sued on accrued when the money in question was collected, and that the action was consequently barred by the statute—the money collected not having been demanded or sued for within three years next following the date of collection. We do not hold that to be the law. The instruction must therefore be treated and acted upon as erroneous.

Various other questions were raised in the progress of the trial in the Circuit Court, but, as they have not been adverted to in the discussions here, they are passed without comment.

The judgments appealed from are reversed and the cause remanded. The other judges concur.

WM. C. GILLIHAN, PUBLIC ADM'R, Plaintiff in Error, v. ISAAC N. WREN *et al.*, Defendants in Error.

1. *Justices' courts—Exhibits filed—Lease—Instrument of writing.*—A lease in writing, duly signed, sealed, and delivered, is an instrument of writing within the meaning of the statute concerning the filing of such instruments, in actions founded thereon, in justices' courts (Gen. Stat. 1865, p. 201, § 13); and the circumstance that it provides for other things than the direct payment of money or property in no way affects its character as a written instrument within the meaning of said statute.
2. *Justices' courts—Jurisdiction not lost by reason of failure of the instrument filed to show the amount demanded—Verbal statement.*—Although a lease filed as an instrument of writing, as the foundation of an action, before a justice of the peace, does not on its face show the amount demanded, that fact is not sufficient to deprive the justice's court of jurisdiction. In such case the defendant is entitled to the verbal statement provided for by section 12, p. 706, Gen. Stat. 1865.

Gillihan, Public Adm'r, v. Wren et al.

Error to Fifth District Court.

Jas. McFerran, for plaintiff in error.

S. A. Richardson, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues on a lease executed by the defendants, containing stipulations for the payment of rent and for the performance of certain services on their part. The suit was originally commenced before a justice of the peace, the lease being filed as the foundation of the action. Judgment was rendered for the plaintiff for eighty dollars, and the defendants appealed to the Circuit Court. The Circuit Court dismissed the cause, the District Court affirmed the dismissal, and the plaintiff brings the case here by writ of error.

The dismissal of the suit is sought to be justified upon the assumed ground that the lease in suit is not an instrument of writing within the meaning of the statute, which requires the plaintiff, in suits before a justice of the peace, to file a written "statement of the facts constituting the cause of action," where the suit is "not founded on an account or instrument of writing" (Gen. Stat. 1865, p. 701, § 13), and also upon the assumption that the demand exceeded the justice's jurisdiction. The lease itself refutes the first position. It is in writing, and duly signed, sealed, and delivered. The circumstance that it provides for other things than the direct payment of money or property in no way affects its character as a written instrument within the meaning of the statute.

As to the second point, it is true that the lease contains nothing showing the precise amount sought to be recovered upon it, whether above or below the jurisdiction of a justice of the peace. It shows no claim in excess of that jurisdiction, and no reason is suggested for presuming that excess in the absence of evidence. It was the right of the defendants to demand of the plaintiff a verbal statement exhibiting to them the grounds or nature of the claim, from which the amount might have been seen or inferred,

Corby et al. v. Bean.

before going into the trial. (Gen. Stat. 1865, p. 706, § 12.) Such verbal statement would have been appropriate to the case, but it was waived by not being insisted upon. It appears, however, by the records, that the plaintiff originally filed his claim in the form of an account for \$87.29, thus apprising the defendants of the amount of the demand. Subsequently the lease was substituted in the place of the account, as furnishing the real foundation of the suit.

In *Joyce v. Moore*, 10 Mo. 271, the action was upon a lease, as in the present suit. The lease was filed with the justice of the peace as the foundation of the suit. The plaintiff obtained judgment, and the defendant appealed the cause to the Circuit Court, whence it was dismissed on the ground that it "did not appear but the damages claimed exceeded" the jurisdiction of the justice. But the Supreme Court reversed the judgment and remanded the cause for trial on its merits. In that case it would seem, from the report of it, that the plaintiff originally sued on an account for rent, and was defeated; and that, thereupon, he brought a fresh suit upon the lease itself, simply filing that instrument as the foundation of the action.

There is no force in the objection taken to the substitution by the plaintiff of the lease in place of the account originally filed in the cause. (*Sublett v. Noland*, 5 Mo. 516; *Boatman v. Curry*, 25 Mo. 433.)

The other judges concurring, the judgment is reversed and the cause remanded.

JOHN CORBY and ABBE M. SAXTON, Respondents, v. HENRY R. BEAN, Appellant.

1. *Contracts — Equity — Deed of trust, reformation of — Usury.*—In an action by the grantee to reform a deed of trust given to secure the payment of a note, where the defense of usury is set up and established in evidence, plaintiff must produce his note and rebate the usurious portion thereof before he can obtain the redress sought. Defendant will not be compelled to resort to an action enjoining the sale of the property under the deed in order to maintain his rights.

Corby et al. v. Bean.

Appeal from Fifth District Court.

Strong & Chandler, for appellant.

I. This suit can not be maintained in a court of equity. Equity will not assist a lender of money to enforce a usurious contract. (1 Sto. Eq. 301-2, § 64, e; 4 Johns. Ch. 122.)

II. Plaintiffs must concede the usury in their petition, and offer to abate usury, and ask to correct and enforce the contract as to the remainder.

Bassett & Van Waters, and *Woodson, Vinyard & Young*, for respondents.

The petition asking no prayer for money, but only the correction of the deed, the new matter set up in the answer constituted no defense, and should properly have been stricken out.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff filed his petition in the Buchanan Court of Common Pleas, the object and nature of which was to correct and reform a mistake in a deed of trust made for his benefit.

The defendant filed his answer denying the alleged mistake, and, for a further defense, set up that the deed was executed and given to secure the payment of a sum of money loaned the defendant by the plaintiff; that the plaintiff charged the defendant twenty-five per cent. per annum for the use of the money, and embodied that amount of usurious interest in the note, and therefore asked that the petition be dismissed. On the hearing in the court below, the mistake in the description of the property inserted in the deed of trust was clearly proved.

It was also shown by plaintiff's own witness, who negotiated the loan and secured the deed of trust, that the actual amount that the defendant received from the plaintiff was \$1,600, and that he gave his note therefor for \$2,000, the \$400 being charged as interest for the use of the money for one year, after which the note was to bear ten per cent. Upon this evidence the court decreed the reformation of the deed, but gave no relief to the

Corby et al. v. Bean.

defendant. Error being brought to the District Court, the decree was affirmed, and an appeal taken here.

The doctrine laid down in the books is that, as usurious contracts are void, courts of equity will not assist the lender when he comes into court asking relief; and that, when he seeks to enforce the contract, the court will refuse all assistance and repudiate the contract.

But our statute does not make usurious contracts utterly void: it declares that where a higher rate of interest has been contracted for than the law sanctions and allows, the court shall render judgment for the sum of money actually lent, and interest thereon at the rate of ten per cent. per annum, upon which judgment the court shall cause an order to be made setting apart the whole interest for the use of the county in which such suit may be brought, for the use of the common schools, and the defendant may recover his costs.

It is a maxim of equity law, of universal application, that he who seeks equity must do equity. Therefore, a court of equity will not assist a person in recovering an unjust or unconscionable claim. Before he can obtain relief he must offer, or be willing, to do what is just and reasonable.

The court below took the position that if the deed was not reformed and the mistake corrected, Corby would be remediless, and the only protection for the defendant would be to enjoin the sale when steps were taken to sell the property under the deed of trust. We do not coincide with that view.

When a court of equity once obtains jurisdiction of a cause, it will retain the same, to do full and complete justice between both the parties. It will, as far as possible, prevent multiplicity of actions, and will not turn a party out of court where his rights may be adjusted and determined without that measure. Either Corby must purge his claim of its illegal and objectionable features, or he can get no redress. I can see no equity in giving him all he asks for, and then compelling the defendant to resort to a new and distinct suit to maintain his rights.

If Corby seeks equitable intervention, he must submit to equitable terms; he must be willing to concede to others what he

Turner v. Field.

demands for himself. Before he can claim the interference of the court he must produce the note, and have it also reformed and relieved of the taint of usury. If he is not willing to rebate from his ill-gotten demands, his bill should be dismissed. It is a mockery of justice to appeal to a court of conscience to uphold and render effective an illegal transaction, and then say to the victimized party: this court does not recognize you; if you wish to defend your rights and obtain justice, you must go elsewhere—you must go through the tedious and expensive process of instituting a new suit, although there is no reason why the whole matter may not be determined at once. Such is not equity.

The judgment will be reversed and the cause remanded; and if the plaintiff will bring in the note, in pursuance of the above-indicated views, the court will proceed to adjust the equities between the parties. The other judges concur.

OTIS A. TURNER, Respondent, *v.* LUCY FIELD, Appellant.

1. *Seal, what sufficient.*—Colored paper in the form of a seal, attached by mucilage to an instrument, is a sufficient sealing. (33 Mo. 35.)

Appeal from Fifth District Court.

H. M. & A. H. Vories, for appellant.

Dunn & Orrick, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues in ejectment. In proving up his title, he offered in evidence a power of attorney which concluded thus: "In witness whereof, I hereunto set my hand and seal." Opposite the signature, in the usual place of a seal, a small piece of colored paper in the form of a seal was attached, and made to adhere by the application and use of mucilage. This was the only sealing. The instrument was objected to and excluded as not being sealed.

The propriety of the action of the court in excluding the power of attorney is the only matter for consideration. The case is a

Bowen v. Lazalere et al.

substantial repetition of *Pease v. Lawson*, 33 Mo. 35; the only distinction between the two consisting in the fact that the paper seal was attached in the one case by the use of a wafer, and in the other by the use of mucilage. The subtle and ingenious argument by which this difference is sought to be magnified into importance is too finely drawn to be of practical utility. The case of *Pease v. Lawson* is decisive of this. Independently, however, of that adjudication, we should deem it quite safe to affirm the action of the District Court in reversing the judgment of the Circuit Court and remanding the cause for trial, and that is the order of the court. The other judges concur.

JOHN T. BOWEN, Plaintiff in Error, v. ALICE LAZALERE et al.,
Defendants in Error.

1. *Practice, Civil—Bill of exceptions—Refusal of judge to sign—Affidavits—Construction of statute.*—The statutory method of bringing up a bill of exceptions, where the judge refuses to sign it, by procuring the signatures of three bystanders, and filing affidavits sustaining it (Gen. Stat. 1865, ch. 169, § 30 et seq.), ought to be avoided if possible. To that end the judge who presided at the trial, under section 29, chapter 169, Gen. Stat. 1865, should state briefly wherein the bill is untrue, if he objects to it on that ground, and should assist the parties in making it up with his notes of testimony. But the law does not require that he should write the bill or change one presented to him.
2. *Practice, Civil—Suit—Arbitration and award—Motion to confirm, withdrawal of.*—Where it was set up as a defense in a suit that the matter in dispute had been submitted to arbitrators, who had made an award, and defendants filed their motion to confirm the award, but afterward withdrew the same: *held*, that by such withdrawal defendants did not abandon that defense to the action. The proceedings to obtain judgment upon the award form no part of the suit.
3. *Practice, Civil—Arbitration and award—Defense, setting up—Judgment.*—When an action for the recovery of a debt is pending, an agreement to arbitrate the matter in dispute is equivalent to an agreement, for a good consideration, to dismiss the suit. But such submission to arbitration can not be pleaded in bar until there is a good and binding award. In such case it is a full defense, and, in the absence of a traverse in the replication, will authorize a final judgment for defendant.
4. *Practice, Civil—Arbitration and award—Answer pleading, must show that all arbitrators acted.*—Under the requirements of the statute (Gen. Stat. 1865, ch. 198, § 5), any number of arbitrators less than the whole are incom-

 Bowen v. Lazalere et al.

petent to sit; and an answer pleading arbitration and award by two out of three arbitrators is fatally defective, and may be disregarded.

5. *Arbitration and award.*—A plea of submission to arbitration as a plea in abatement is waived by plea and trial on the merits, and can not be set up in abeyance after judgment.
6. *Practice, Civil—Trial—Evidence—Instructions.*—Where there is any evidence in a trial tending to prove the issues of fact in a case, it must go to the jury, although the legal effect of those facts is a question of law upon which instructions may be given.
7. *Practice, Civil—Bill of exceptions—Refusal of court to sign.—Affidavits.*—Where a judge refuses to sign a bill of exceptions as being untrue, and refuses to permit it to be filed, it will be held to be true, notwithstanding, if sustained by the requisite number of affidavits, unimpeached by counter-affidavits, even though the affidavits are sworn to by interested parties.

Error to Fifth District Court.

S. A. Richardson, and *Hall & Oliver*, for plaintiff in error.

Vories and *McFerran*, for defendants in error.

I. The submission in writing to arbitration operated as a discontinuance of the cause; and the District Court did not err in reversing the judgment of the court below. (*West v. Stanley*, 1 Hill. 69; 4 Barb. 541; 4 Cow. 547; *Larkin v. Robbins*, 2 Wend. 505; *Blunt v. Whitney*, 3 Saund. 4.)

II. The bill of exceptions, signed by the bystanders and supported by affidavits, together with the sworn copies of the papers directed in said bill of exceptions to be copied therein, should be taken and considered as a part of the record in the cause. (*Wallace v. Bolton*, 10 Mo. 660; *Dougherty v. Whitehead*, 31 Mo. 255; Gen. Stat. 675; *Hill on New Trials*, 21, § 10; 29 Mo. 447.)

III. The court below usurped the province of the jury by instruction No. 2 in the record, given to the jury at the instance of the plaintiff in error. (*Benton v. Klein*, 42 Mo. 97; *Claffin v. Rosenberg*, 42 Mo. 439; *Singleton v. Pacific R.R. Co.*, 41 Mo. 465; *McGovern et al. v. Craig et al.*, 39 Mo. 156.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit in the Daviess County Court of Common Pleas against the defendants, upon a promissory note for about \$500. Defendants admitted the execution of the note,

but said it was procured by fraud. The plaintiff, in reply, denied all the facts charged as constituting the fraud. Afterward the defendants filed a supplemental answer recapitulating the former answer, with the addition of a new defense—that the matter in dispute had been submitted to arbitrators, who had made their award. The record shows that the defendants at the same time filed the submission and award and a motion to confirm the award.

The court, upon motion of plaintiff, struck from the file the motion to confirm, for want of notice, whereupon the defendants withdrew the submission and all the papers connected with it. No reply to the supplemental answer is filed, and no further allusion is made to the matter during the trial. This seems to be the same award brought before the court at the present term in the case of *Shores and Wife v. Bowen*.

The cause proceeded to trial upon the allegation of fraud in procuring the note, and the verdict and judgment were for the plaintiff for its full amount, which judgment was reversed in the District Court. After the trial the defendants presented a bill of exceptions, which the judge refused to sign, certifying as his reason that it was untrue. It was then signed by three bystanders, but the judge refused to permit it to be filed in court for the same reason. Afterward, and within five days of the trial, the defendants took and deposited with the clerk four affidavits sustaining the bill of exceptions, which are annexed to and certified up as part of the record—the original bill of exceptions so sustained having been brought up by them and filed in the District Court—and come here with the rest of the record.

Counsel for the plaintiff seem to criticize this mode of bringing up the bill, but I do not see wherein it is not a compliance with the requirements of the statute. As this statutory mode of bringing up the facts of a case is unusual, and is liable to embarrass the appellate court by the necessity imposed upon it of deciding the truth of the bill, we take the opportunity of saying that it ought to be avoided if possible. To that end, the judge who presides at the trial would do well to state briefly wherein the bill is untrue, if he objects to it upon that ground, and to give the parties such assistance in making it up as his impartiality and his notes of

Bowen v. Lazalere et al.

the testimony eminently qualify and enable him to do. The law, however, does not require that he write the bill, or change one presented to him—only that he shall certify the cause of his refusal to sign it. A liberal construction of this requirement, we think, would make it his duty to point out in a general way, but with such particularity as to make it understood, in what the untruthfulness consists.

It is claimed by the plaintiff that the defendants, by withdrawing their motion to confirm the award, abandoned that portion of their answer. But it could not have that effect. The proceedings to obtain judgment upon the award form no part of this case, and should not have been mixed up with the record. When the parties agreed to submit the matter in controversy to arbitration, they thereby agreed that the suit be discontinued. Another tribunal was selected; and if the plaintiff did not voluntarily dismiss his case, the defendant could compel him to do so by motion setting up the submission, or by answer in the nature of a plea in abatement *puis darrien*. (Larkin v. Robbins, 2 Wend. 505; Resseque v. Brownson, 4 Cow. 341.) The judgment sought upon the award had nothing to do with this case, and the withdrawal of the papers pertaining to it can not be construed as an abandonment of any portion of the answer. I do not know that I understand the views that prompted the action of counsel in the trial of the case. The allegation of submission and award was neither replied nor demurred to; and the parties went to trial upon that portion of the answer alleging fraud in the procurement of the note. They seem to have lost sight of the award altogether; the answer is upon the record with no reply; and we are unadvised whether the parties intended to retain or abandon it, or why no further allusion was made to it. We will, however, examine it and see what kind of defense it makes.

We have seen that a submission may be made to work a dismissal of the suit. It is not necessary that there be an award, for the consent to arbitrate is in itself a selection of another tribunal and an agreement to transfer the cause to that tribunal, which agreement the court will carry into effect whenever it is properly brought to their notice. So far as its effect upon the

Bowen v. Lazalere et al.

pending action is concerned, it is equivalent to an agreement, for a good consideration, to dismiss an action brought to recover a debt. But such submission alone can not be pleaded in bar. It is no answer to the merits until there is a good and binding award. It is by no means certain, because there is a submission, that an award will follow. The arbitrators may refuse to serve, or proceed so irregularly as to vitiate their action, or their authority may be revoked; and if the submission could be pleaded in bar, the claim would be lost without any trial upon the merits.

In the record before us this matter is not set up by way of abatement to procure a discontinuance of the suit. It is in the nature of a plea in bar to the merits—an answer setting up the award as a full defense against the claim. So that, this answer not being denied, if the award is a good one, it is a full defense, and a final judgment should have been given for the defendants. It is only necessary, then, to examine this part of the answer and see what kind of an award is pleaded. The submission seems to have been a good one, and, if properly brought before the court, would have procured a discontinuance of the suit. But the award, as set forth, is radically defective.

The answer states that the controversy was "submitted to Jas. L. Davis, Wm. B. Johnson, and Wm. L. Givens, as arbitrators," etc., and that afterward two of said arbitrators, Johnson and Givens, gave notice to the parties, proceeded to hear and examine the matters in controversy, made their award, signed the same, etc. No mention is made of Davis; but it affirmatively appears that only two of the parties met and heard the case. The absolute requirement of the statute, that "all the arbitrators must meet together and hear all the proofs and allegations of the parties," renders a less number absolutely incompetent to sit. This award, then, as set up in the answer, was no adjustment of the controversy, and the parties did well to disregard it. To the claim of the defendants in this court, that the submission itself abated the suit, and that the judgment should therefore be reversed, it may be further said that matter in abatement is, in general, waived by a plea and trial upon the merits. It would be unconscionable, in a case where the court has undisputed jurisdiction, to allow a

Bowen v. Lazalere et al.

party, after having pleaded voluntarily, and gone to trial and been defeated upon the merits, to come in after judgment, and especially upon error, and say that the plaintiff had agreed to discontinue the suit.

We must, then, see whether any error has been committed upon the trial. The plea of fraud, upon which alone issue was joined, sets forth that the plaintiff and defendant Alice Lazalere were partners in selling goods; that plaintiff proposed to sell to her his interest in the firm; that he represented it to be worth over \$3,000, when, in fact, it was worth but \$1,800, which he well knew; that the plaintiff was the active member of the firm, and his partner had no charge of the business—was ignorant of its condition and of the nature of plaintiff's interest; that plaintiff declined to take an inventory, claiming that he had pressing business in Virginia which he must attend to, and could not remain for that purpose, when, in fact, he had no business calling him to Virginia; that defendant Alice was induced by these representations to agree to give for the interest of the plaintiff about the sum of \$2,800, of which the note in controversy was a part; and that she has paid everything but this note, and has paid more than the actual value of the interest purchased. In reply, the plaintiff denies in detail all these allegations, and avers that his partner, Alice, was represented in the business of the firm and in the purchase of the plaintiff by her father as her agent; that he had carried on the business before the plaintiff became a member of the firm, and knew more about the goods than any one else.

Upon the trial the court gave the following instruction, at the instance of the plaintiff: "That the evidence in this cause, as to false and fraudulent representations charged in the answer, has failed to show such false and fraudulent representations as constitutes any defense in law to the note sued on."

Other instructions, right and wrong, were given and refused; but it is wholly unimportant to consider them. The only question necessary to consider is this action of the court in taking the case from the jury.

It is a principle well settled and always adhered to, that if there is any evidence tending to prove the issues of fact, the case must

Owens v. Rector.

go to the jury, although the legal effect of those facts is a question of law upon which instructions may be given. It seems to us there was some evidence having some tendency to prove the allegation of the defendant; and even though the court might be of opinion that the weight of that evidence was altogether insufficient, it had no right to say so. We are bound to treat this bill of exceptions as true, even though certified by the court to be untrue, and sustained by the affidavits of parties interested. The other party had a right to file counter-affidavits, but failed to do it; and it is before us unimpeached, and makes a case upon which the defendant is entitled to the opinion of the jury, under instructions as to what constituted fraud in law. The error is not in deciding what is fraud, but in assuming what is proved.

The judgment of the District Court reversing that of the Common Pleas is affirmed and the cause remanded. The other judges concur.

JOHN L. OWENS, Respondent, v. GEO. W. RECTOR, Appellant.

1. *Practice, Civil—Instructions—Jury—Evidence.*—Where there is testimony in support of the answer in a suit, defendant has a right to the opinion of the jury upon the issue raised by it unless the answer fails to make out a case that entitles him to relief. An instruction, in such state of proof, taking the case from the jury, where the answer is sufficient, is improper.
2. *Contract—Sale—Equity—Failure of consideration—Fraudulent concealment—Repudiation—Defenses to action by vendor for purchase money.*—In general, when the title of a grantor in a deed fails, and the defense in a suit for the purchase money is that the purchaser gets nothing by his deed; or in a sale of parcels of land in gross, where the title to a portion fails, and the purchaser seeks to avoid the payment of a part of the purchase money—in either case the purchaser may rescind the contract by conveying or offering to convey back all the title he has received; in which case he may recover what has been paid, and refuse to pay what is unpaid. If he chooses to affirm the contract, he can recover but nominal damages for the breach of the covenant of seizin, unless actually evicted; the reason being that he has suffered as yet no actual damage, and that his possession may ripen into title. But in case of fraudulent concealment or misrepresentation as to some specific material fact affecting the value of the property sold—the purchaser trusting to these representations of the seller—he is not bound, upon discovery of the fraud, to repudiate the contract and give back the possession. He may do so, or he

Owens v. Rector.

may stand by his purchase, and sue for damages; or if the purchase money is not paid, he may reduce it by the amount of the damages to which he is entitled.

3. *Practice, Civil — Action for deceit — Intention — Instructions — Jury.*—In general, if a purchaser would hold on to the property purchased, and look to his vendor for damages for deceit, there being no warranty, he must, if sued for the purchase money, satisfy the jury that the deception was intentional. But the question of deception is one for the jury, and not the court, to decide. If there was evidence tending to show that the situation of the property was misrepresented, and that the defendant, in his purchase, acted upon those misrepresentations, and not upon his own judgment, the question of knowledge and intention on the part of the seller becomes a material one, and must be left to the jury; and if the court took the case from the jury because in its opinion such knowledge was not proved, it committed an error

Appeal from Fifth District Court.

Woodson and Jones, for appellant.

I. A grantee may set up as defense to a note given for the purchase of real estate, that the property sold to him, or part of it, was not the property of the grantor, though he (the grantee) may not have been evicted. (23 Mo. 151; 4 Mass. 627; 12 Mass. 304; 8 Pick. 547; Rawle on Covenants, 464.)

II. The answer sets up fraud, and sets out the representations made by the agent of the plaintiff, upon which he relied, and which proved to be false. This constitutes a defense. (12 Mo. 517; Rawle on Covenants, 485.)

III. False representations by the vendor, by which the vendee is induced to purchase, though honestly made, constitute fraud in law. (11 Mo. 655.)

IV. Fraud in fact is a question for the jury. (7 Mo. 245.)

V. If plaintiff's agent assumed to know the boundaries of the lots when in fact he did not know them, and the defendant, relying upon his representations, bought the property, and the representations proved to be false, it constitutes fraud. In such case the plaintiff is bound by the act of his agent. The purchaser may detain the purchase money, or have such other proper relief as he may claim in a court of law or equity. (Rawle on Covenants, 466-7, 471, 475-9.)

Owens v. Rector.

VI. The doctrine that representations by his agent must have been known to be false by the vendor does not apply in the sales of real estate. (29 Mo. 189.)

Hall & Oliver, and *Strong & Chandler*, for respondent.

The pleadings and evidence show that defendant and those claiming under him have peaceable possession of all defendant bought, and defendant does not offer to rescind the sale. "The purchase money and the land could not both be retained." (*Ash v. Holder*, 36 Mo. 167; *Smith v. Busby*, 15 Mo. 392; *Wallace v. Boston*, 10 Mo. 662-3; 5 Blackf. 430; 15 Ind. 176; 17 Ind. 98; *Willeys v. Burgess*, 34 Ill. 500; *Rawle on Covenants*, 565; 10 Mo. 466; 23 Mo. 163.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit, in the Buchanan Court of Common Pleas, upon a promissory note for \$700 executed to him by defendant. Defendant pleads fraud, and alleges that the note was given for the deferred payment upon a purchase of certain lots in St. Joseph at the price of \$3,100, the balance having been paid in cash at the time of the purchase; that the plaintiff, by his attorney for the sale, Jas. A. Owens, executed a warrantee deed for the lots by number, being lots 6 and 7, etc.; that, before making the sale, plaintiff's land agent and attorney went upon the premises with the defendant, and pointed them out to him—the same being inclosed with a fence, and containing a frame dwelling-house back about sixteen feet from the front of the lots as inclosed; and that, relying upon these representations of locality, the defendant purchased the lots without survey or further examination. Defendant further alleges that these representations were untrue, and known to be so by said Owens; that the said lots were only partially inclosed by the fence; that a portion of them are outside and below the ground fenced; that the street running in front of the lots will, when opened according to its true location, cut off some nine feet of the front of the house; and that the property is worth \$2,000 less than it would

have been if located as represented by plaintiff's agent, which sum is the damages he has suffered, and for which he asks judgment.

The reply denies all the allegations of the answer except the consideration of the note. Upon the trial there was testimony tending to prove the defendant's allegations, and the jury allowed him some \$800 damages as an offset. The verdict was set aside by the court; and upon the next trial the case was taken from the jury by a positive instruction to find for the plaintiff the amount of the note and interest.

Inasmuch as there was testimony in support of the answer, the defendant had a right to the opinion of the jury upon the issue raised by it unless the answer failed to make a case that entitled him to relief. The plaintiff claims that the pleading is defective in not showing dispossession or an offer to rescind the sale. For aught that appears by the answer—and so the evidence shows the fact to be—the defendant and those claiming under him are still in peaceable possession of the house and land inclosed by the fence, and no offer has been made to re-convey the premises.

This case is to be distinguished from cases where the title of the grantor fails, and the defense is that the purchaser gets nothing by his deed, and should not be compelled to pay the purchase money; or in a sale of parcels of land for a sum in gross, where the title to a portion fails, and the purchaser seeks to avoid the payment of a part of the purchase money. The general rule in those cases is that the purchaser may rescind the contract by conveying or offering to convey back all the title he has received, in which case he may recover what has been paid, and refuse to pay what is unpaid; or, if he chooses to affirm the contract, he can recover but nominal damages for the breach of the covenant of seizin, unless actually evicted; and the reason is given in *Small v. Reeves* (14 Ind. 164, approved in 17 Ind. 98), that he has suffered as yet no actual damage, and that his possession may ripen into title.

But in case of the fraudulent concealment of, or fraudulent misrepresentations as to some specific material fact affecting the value of the property sold—the purchaser trusting to the repre-

Carr v. Waldron.

sentations of the seller—he is not bound, upon discovery of the fraud, to repudiate the contract and give back the possession. He may do so, or he may stand by his purchase and sue for damages; or if the purchase money is not paid, he may reduce it by the amount of the damages to which he is entitled.

He may rescind the contract, even though both parties were mistaken in relation to facts that induced the purchase. (*McFerreran v. Taylor*, 3 Cranch, 281; *Miles v. Stevens*, 3 Barr, Penn. St., 21.) But, in general, if a party would hold on to the property purchased, and look to his vendor for damages for deceit, there being no warranty, he must satisfy the jury that the deception was intentional. The tort is the foundation of his claim—not the contract, nor the innocent mistake of both parties. But the question of deception—of knowledge—is one for the jury to decide, and not for the court. If there was evidence tending to show that the situation of the property was misrepresented, and that the defendant, in his purchase, acted upon those misrepresentations, and not upon his own judgment, the question of knowledge of intention on the part of the seller becomes a material one, and must be left to the jury; and if the court took the cause from the jury because in its opinion such knowledge was not proved, it committed an error. The reason for its action does not clearly appear in the record, but it seems to have been based upon the assumption of some fact in the province of the jury to decide.

The judgment is therefore reversed and the cause remanded. The other judges concur.

ROBERT E. CARR, Plaintiff in Error, v. WILLIAM W. WALDRON,
Defendant in Error.

1. *Practice, Civil — Mortgage — Contribution — Filing of mortgage — Construction of statute.*—Where one out of several grantees in a mortgage brings an action for contribution against another, it is not necessary that the mortgage be filed with the papers. That is necessary only where the action or pleading is founded on an instrument or pleading executed by the adverse party. (Gen. Stat. 1865, ch. 165, § 51.)

Carr v. Waldron.

2. *Practice, Civil—Mortgage—Contribution—Defect of parties—Construction of statute.*—In a suit for contribution by one of several grantees in a mortgage against another, all the mortgagees had an interest, and demurrer to the petition would lie where all were not made defendants. (Gen. Stat. 1865, ch. 161, §§ 5, 6.) There having been no ascertainment or adjustment of the amounts to which each was entitled, all should have been brought in, so that there might be a final determination binding on all parties. But section 7, chapter 153, Gen. Stat. 1865, has no application to such a case.

Error to Fifth District Court.

McFerran, for plaintiff in error.

Hall & Oliver, for defendant in error.

The mortgage referred to in the petition was the foundation of the action, and should have been filed with the petition in the cause. (Gen. Stat. 1865, p. 662, § 51; 37 Mo. 167; 38 Mo. 224.)

WAGNER, Judge, delivered the opinion of the court.

The amended petition contains two counts, stating in substance that one Beauchamp, by his certain mortgage, conveyed to the plaintiff and defendant in this suit, and several other persons therein named, a lot of notes and accounts, amounting to over \$3,000, to secure the said parties on account of certain indebtedness; that the land conveyed in the mortgage was sold, and did not pay off the debts; that plaintiff had paid two several bills of exchange for the mortgagor, and that the mortgagor was largely indebted to him. There is a further averment that defendant obtained and became possessor of two of the notes conveyed by the mortgage, and collected about \$500 of the same. The petition then sets out the contribution above in that amount to which the plaintiff deems himself entitled, and asks judgment for the same.

To this petition the defendant filed a demurrer, and alleged as grounds of objection: First, that the mortgage constituted the plaintiff's cause of action, and that it was not filed among the papers in the cause, nor any reason given for not filing it; second, that there was a defect of parties—defendants, the

Carr v. Waldron.

mortgagees, all being necessary parties in order to have a complete and final determination of the suit.

The court sustained the demurrer; and the plaintiff neglecting to amend, final judgment was rendered for defendant, which the District Court affirmed. It is contended for the plaintiff that it was not necessary to make all the mortgagees parties; and, to sustain this view, chapter 153, section 7, of the statute is cited. That section says that any person claiming an interest in the mortgaged property may, on motion, be made a defendant to any proceeding, etc. But that section has exclusive reference to suits for foreclosure of mortgages, and this was not a proceeding for foreclosure.

There is nothing in the position taken in the demurrer, that the mortgage should have been filed; that is only necessary where the action or pleading is founded on an instrument executed by the adverse party. (Gen. Stat. 1865, p. 662, § 51.) Here the instrument was not executed by the defendant. Had the suit been against the mortgagor for a foreclosure, the statute would have applied. The only point in the case is, was there a defect of parties?

The statute provides that any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, and that all parties who are united in interest must be joined as plaintiffs or defendants. (Gen. Stat. 1865, p. 161, §§ 5-6.) Where the petition shows on its face that there is a defect of parties, either plaintiffs or defendants, the objection is properly taken by demurrer.

In the present case the parties were all mortgagees, and had an interest in the mortgaged property. There had been no ascertainment or adjustment of the respective amounts to which each was entitled; and, where such is the case, all should be brought in, in order that there may be a final determination binding all the parties. (Sto. Eq. Pl. § 207.)

Where there is a certain and fixed fund, and each party has a certain aliquot part in it, distinct from the others, so that there is no common interest in the object of the bill, the others need not be made parties. (Sto. Eq. Pl. § 212.) This

Shores et al. v. Bowen.

rule is necessary to protect the defendants and prevent a multiplicity of suits.

Chancellor Walworth, in *Hallet v. Hallet* (2 Paige, 19), states the rule to be "that if it appears on the face of the plaintiff's bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof to whom the defendant would be bound to render a similar account, the latter may object that all who have a common interest with the plaintiff are not before the court." (See, also, *Dean v. Chamberlin*, 6 Duer, 691.)

From aught that appears from the record, each of the mortgagees had a common interest in the fund alleged to be in the hands of the defendant. Had he paid the amount claimed by the plaintiff, he would have been subject to be again harassed by the other parties, as they would not have been concluded by the former litigation, to which they were not parties. There had been no adjustment either between the parties or before any tribunal to determine the aliquot part due to each, and it was therefore bad practice to sue without joining all.

The demurrer was rightfully sustained, and the judgment will be affirmed. The other judges concur.

JOHN F. SHORES AND WIFE, Plaintiffs in Error, v. JOHN T. BOWEN, Defendant in Error.

1. *Arbitration and award — Motion to vacate, time of filing.*—Where a party aggrieved by an award suffered a term to elapse before filing a motion to vacate the same, he waived his remedy.
2. *Arbitration and award — Judgment on motion to vacate, demurrer to.*—A party aggrieved by an award has a right to file a paper in the nature of a demurrer to a motion for judgment on the award; and such paper, if properly filed, should not be stricken out on motion. Judgment on the arbitration and award is not granted as of course. Where the award was not vacated or modified or postponed, under the provisions of the statute (Gen. Stat. 1865, ch. 198, § 8 *et seq.*) the party aggrieved may defend himself against the motion, even though he may have neglected to apply in time to have the award vacated.

Error to Fifth District Court.

S. A. Richardson, for plaintiffs in error, cited 10 Kinne's Law Compendium, 42; 3 Barb. 275; 2 Hill, N. Y., 387; 12 Wend. 503; 23 Wend. 628.

Vories & Vories, and *McFerran*, for defendant in error.

I. The law does not authorize or permit a demurrer to a motion to confirm the award of the arbitrators, and the award and motion were sufficient in law.

II. The court below erred in not confirming said award, and in sustaining the demurrer. (Gen. Stat. 1865, p. 771, §§ 1, 6-8; *Valle v. North Missouri R.R. Co.*, 37 Mo. 445; *Caldwell on Arbitrators*, 284, n. 1, and p. 286; *Solomons v. McKinstry*, 13 Johns. 27.)

III. The court below erred in sustaining the motion to vacate said award, because said motion to vacate was not made at the next term of said Court of Common Pleas after the publication of said award. (See Gen. Stat. 1865, p. 772, § 11.) And said court had no right or authority in law to render final judgment vacating said award, on motion of the plaintiffs in error, and the District Court committed no error in reviewing said judgment. (34 Mo. 524.)

IV. The court below erred in refusing to confirm the award of arbitrators, and in rendering judgment vacating the same. (*Caldwell on Arbitrators*, 276; *McClure v. Shroyer*, 13 Mo. 104; *Valle v. N. M. R.R. Co.*, 37 Mo. 445; 18 U. S. Dig. 67, § 36.)

V. The award by two arbitrators under the terms of the submission, the third being absent and refusing to serve, is good. (*Crofoot v. Allen*, 2 Wend. 494; Gen. Stat. 1865, p. 771, § 5.)

BLISS, Judge, delivered the opinion of the court.

On the 28th of August, 1868, Alice Lazalere, then a *femme sole*, but now the wife of John F. Shores, and one of the plaintiffs, and defendant John T. Bowen, duly executed a submission of certain matters in dispute "to the arbitrament of Wm. B.

Shores et al. v. Bowen.

Johnson, Wm. L. Givens, and James L. Davis, or any two of them;" "that the award of the arbitrators as aforesaid, when made, may be made a rule of the Circuit Court or Court of Common Pleas of said Daviess county," etc., the parties being residents of said county. The arbitrators were sworn, and met on the 28th of August, "having duly notified the parties of the place of hearing," etc.; but the parties not being ready, they adjourned until the 31st of August. Two of the arbitrators, Johnson and Givens, met at sundry times thereafter to hear and examine the matters submitted (Davis refusing any longer to attend), and, on the 24th of September, executed their award, which was witnessed by one McDowell. It does not appear that Bowen attended any of their meetings. On the 26th of March, 1869, the plaintiffs served upon the defendant a notice, with a copy of the award, that they should apply to the Court of Common Pleas of said Daviess county on the first day of the next term—more than fifteen days thereafter—for a confirmation and judgment upon it; and immediately thereafter, and more than ten days before the term, the defendant gave the plaintiff notice that he should apply at the same term for an order to vacate the award. On the opening of the April term both motions were filed, with the necessary exhibits, so that the court had before it at the same time a motion to confirm the award and for judgment according to its terms, and also a motion to vacate it and set it aside.

The defendant demurred to the motion for judgment, and filed several affidavits in support of his motion to vacate. The Common Pleas Court sustained the latter motion, and of course overruled the motion for judgment. This action was reversed upon error in the District Court, and the defendant brings the case into this court.

We will first consider the motion to vacate; for, if that can be sustained, there can, of course, be no judgment upon the award. It should be remarked that these two motions are independent proceedings, and should not have been mixed in the record or brought up together. But, as they are here, we will consider them both. This was an arbitration under the statute, and the parties have endeavored to proceed according to its requirements.

Shores et al. v. Bowen.

Upon examination of its provisions, and noting the date of the award, it will clearly appear that the motion to vacate was presented too late. Section 11 of the act imperatively requires that this motion shall be filed at the first term of the court succeeding the publication of the award, provided ten days shall have elapsed. This provision is for the benefit of those who feel aggrieved at an unexpected award, and is designed to relieve them from the necessity of proceeding in chancery to impeach it, though section 23 saves the latter remedy if one chooses to pursue it. But if he would avail himself of this statutory remedy he must act promptly, that the party who would confirm the award may have opportunity to apply for judgment within his year. The motion to vacate must necessarily take precedence of the motion for judgment, though this record shows action upon the latter motion first. To suffer a term to intervene is to waive this remedy, whatever ground for relief he may have under it. The defendant let the October term of the court pass by, and did not seem to think of his right to institute this proceeding until reminded of it by the notice of the motion to affirm. The plaintiffs filed a motion to strike from the files this motion to vacate, upon the express ground that it was presented out of time, and for this reason it should have prevailed. The Court of Common Pleas committed manifest error in overruling it and in sustaining the motion to vacate, even though the grounds for so vacating were otherwise good. The defendant claims that the motion to vacate was good so far as time was concerned, because plaintiffs did not show when publication of the award was made. But the record shows, through the affidavit of the witness McDowell—which, though not copied in connection with the motion, is given in another part of the record—that the award was signed and published at its date, which was more than ten days before the October term. (12 Mo. 107.) But it is not so clear that the plaintiffs were entitled to judgment upon the award. They filed with and in support of their motion, the agreement to arbitrate, the affidavit of the arbitrators and their award duly executed and witnessed, with proof of its execution. The defendant demurred to the motion, which demurrer the plaintiffs moved to strike from the files, and excepted

to the action of the court in overruling his motion. The defendant had a right to object to the sufficiency of the motion for judgment by a paper in the nature of a demurrer; and if his objection is not well taken, judgment will be entered. It is but a usual way of saying that the plaintiff does not make a case; and this demurrer, as it may be called, if properly filed, should not be stricken off. Papers, if improperly filed, may be stricken from the files, but not because the issue made by them is with the opposite party. Otherwise, all demurrers, if not well taken, should be stricken out on motion instead of being overruled on hearing.

The plaintiffs, in moving to strike off the demurrer, seems to have supposed that under section 7 of the arbitration act they were entitled to judgment as of course, unless the award was vacated or modified or postponed under the provisions of the statute. But this can not be the meaning of the section. The award must be good upon its face. The papers filed must show that the statute has been complied with; and whether the objection to their sufficiency be made in a writing in the nature of a demurrer or not, the court should not give judgment upon the award unless the party shows himself entitled to it. The other party should not be driven to a court of equity for redress, even though he may have neglected to apply in time to have the award vacated or modified, but should be permitted to defend himself against the motion. The motion to strike the demurrer from the files was properly overruled, and we think some of the objections to the validity of the award were properly taken, and that the court did not err in refusing to render judgment upon it.

The award shows that all the arbitrators were present at the first meeting, but that no evidence was then submitted. At the subsequent meetings, when the examinations of the matters in dispute were had, only two of the arbitrators were present. The case was heard by the two and decided by the two. Unless there is some peculiarity in this submission, differing in this respect from others, and choosing in fact but two arbitrators instead of three, this absence from the hearing of the case is fatal to the award. Our statute expressly provides that "all the arbitrators

Kercheval v. King et al.

must meet together, and hear all the proofs and allegations of the parties," but that the award shall be valid if made by a majority only, unless the submission require the concurrence of the whole. Only two of the arbitrators having heard the proofs and allegations, it is no arbitration, and the award can not bind the defendant. The plaintiffs must claim that the submission is peculiar, in this, that it chooses two or three arbitrators as the two or three may happen to meet—that it is uncertain as to numbers. But it expressly names the three, and the statute requires that all should meet.

In New York, before the adoption of the revised statutes, from which the provision in our statute above referred to is a copy, it was held that an agreement to abide the award of three persons or any two of them, "the award of either two of them to be good," etc., was obligatory if only two of the arbitrators met and heard the case, provided the other had notice of the meeting and refused to attend. (*Crofoot v. Allen*, 2 Wend. 494.) The annotator of the second edition of Wendell's Reports recognizes the change made by the statute in this respect. It seems clear to me that the parties intended to choose all the three men named as arbitrators, though they were willing to abide by the award of two. Without the provision of the statute, the award would probably be good although one refused to act. But its requirement is express, and I know of no way to evade it.

The District Court reversed the judgment of the Court of Common Pleas, and rendered a judgment affirming the award. That judgment should be reversed, and the judgment of the Court of Common Pleas sustaining the demurrer to the motion for judgment on the award should be affirmed, but the other judgment upon the motion to vacate should be reversed.

T. B. KERCHEVAL, Appellant, v. JAS. KING *et al.*, Respondents.

Practice, Civil—Pleadings—Contracts—Consideration—Averments—What omissions cured by verdict.—If the record in a suit is radically defective—as, if it shows that there was no obligation, no legal indebtedness, or that the judgment was rendered on a *nudum pactum*—the error may be taken advan-

Kercheval v. King et al.

tage of afterward. But the mere omission to set out a fact as the consideration, or the whole consideration, on account of which omission a demurrer could have been maintained, or any fact that must have been found by the jury, is cured by the verdict.

2. *Practice, Civil—Pleadings—Contract—Consideration—Averments.*—In a suit upon a contract, where the main object of the contract was the sale of certain property of plaintiff to defendant, and, as a consideration for the sale, defendant made sundry independent agreements, an action would lie for a violation of one of defendant's agreements without setting up the other; but the provision concerning the sale should be set out in either case.

Appeal from Fifth District Court.

Vories, and Woodson & Jones, for appellars

If enough of the contract is set forth to show the obligation of defendant and the breach complained of, this is sufficient, and will work no surprise on the party. (*Little v. Mercer*, 9 Mo. 218; 4 Mo. 32; 2 Mo. 39; 10 Mo. 515; 1 Chit. Pl. 307; *Gould's Pl.* 165, § 19; *Alvord v. Smith et al.*, 5 Pick. 232; *Ferguson v. Harwood*, 7 Cranch, 408; *Briggs v. Murdock*, 13 Pick. 306; 4 Cow. 440; 6 East. 564; 8 East. 7.)

Hall & Oliver, and Bassett & Van Waters, for respondents.

I. There is no consideration stated for defendant's promise to plaintiff. (*Frazier v. Roberts*, 32 Mo. 457; *State v. Matson et al.*, 38 Mo. 491; 40 Mo. 182; 37 Mo. 34; *Han. & St. Jo. R.R. Co. v. Mahoney*, 42 Mo. 470.)

II. The agreement between Kercheval and Fouts, received in evidence, was improperly received. (1 Greenl. Ev. §§ 662; 3 U. S. Dig. 144, § 179; 1 Chit. Pl. 299; *Swan's Pr. & Pl.* 206-9; 35 Mo. 528; 20 Mo. 229; 22 Mo. 27; 19 Mo. 290; 37 Mo. 307.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff filed in the Buchanan Court of Common Pleas a petition against defendants, setting forth that on the 25th of March, 1865, he entered into a written contract with Russel & Fouts for transportation and delivery to them at Virginia City, Montana Territory, of 80,000 pounds of freight at ten cents

Kercheval v. King et al.

per pound in clean gold dust; that afterward, on the 11th of August, 1865, he entered into a contract in writing with defendants, by which they agreed to pay him for his freight trains, cattle, etc., mentioned in the agreement, and further, to assume for plaintiff his contract with said defendants and Fouts, and perform all its conditions, on certain conditions, to-wit: should the freight mentioned in said contract be delivered at Fort Benton before September 15, 1865, defendants should receive seven cents per pound in clean gold dust, etc.; but if delivered between September 15 and October 15, 1865, they were to receive eight cents. The contract further provided that defendants were to collect all charges against Fouts & Russel, and, after deducting what was due them, to place the balance to plaintiff's credit. The petition avers performance by the plaintiff of all the conditions of the contract, and charges that defendants collected of said Fouts & Russel \$8,000 in clean gold dust, and placed no part of it to the credit of the plaintiff, and have never paid him any part of it, although \$1,600 of it, worth \$2,000, belonged to him, for which he asks judgment. The petition is of much greater length, though the foregoing is the substance of all its averments except one or two immaterial ones. The contract between plaintiff and defendants was filed with the petition, though the contract between plaintiff and Fouts & Russel was not filed, for the reason, as alleged, that it was surrendered to defendants.

The defendants admit the contract between them and the plaintiff, but deny that its conditions were fulfilled by him; admit the contract between plaintiff and Fouts & Russel; admit that they paid him nothing, and deny that they collected anything on it; aver that the freight mentioned in it was not delivered to them for transportation until after the 15th of October, when they transported it to Fouts & Russel, although they were at Fort Benton with their teams, and waited a long time to receive it, and they claim damages for the delay. The defendants also set up a part of the contract, merely alluded to but not described in the petition, by which the plaintiff sold them his freight trains, cattle, etc., and aver that a portion of the property was not delivered, and claim damages in consequence.

Kercheval v. King et al.

The plaintiff, in reply, does not deny the conditions of the contract set up by defendants, but only its breach, and also the delay at Fort Benton. The case went to the jury without objection to the pleadings by demurrer or motion. The testimony of several witnesses on both sides was submitted, and the plaintiff obtained a verdict and judgment for \$2,100.

The instructions asked and given on both sides were full, and fairly presented the law of the case. They sustained every position taken by defendants except one, hereafter to be considered, in relation to the admission of the contract in evidence, and one cutting off the evidence of the market value of gold dust. The jury were expressly charged that they must find that the freight mentioned in the Fouts & Russel contract was at Fort Benton, ready for delivery to the defendants for transportation, before the 15th of October, or they were not liable to the plaintiff for the difference between the eight and ten cents per pound.

The first point made in this court is upon the petition, that it is radically defective in not stating a consideration for defendants' promise, and will not sustain a verdict.

The plaintiff had made a contract with Fouts & Russel for transporting 80,000 pounds of freight at ten cents, and defendants agreed to transport the same for eight cents if delivered before a certain time, collect the ten cents, and pay the plaintiff the difference. The objection, if I understand it, is that no consideration was set forth for that agreement, and therefore, although no motion was made or demurrer filed, and no objection of any kind taken to it before trial, the judgment should be reversed. Judgments can not be reversed for mere informalities. Rules of pleading are not traps, but safeguards, and their violation should ordinarily be objected to by motion or demurrer before trial upon the merits. It is true, if the record is radically defective—if it shows that there was no obligation, no legal indebtedness, as that judgment was rendered upon a *nudum pactum*—it is a substantial error. But the mere omission to set out a fact as the consideration, or the whole of the consideration, on account of which omission a demurrer could have been maintained, or any fact that must have been found by a jury, is cured by verdict.

Kercheval v. King et al.

(Gen. Stat. 1865, p. 671, § 19; Jones v. Louderman, 39 Mo. 287; Richardson v. Farmer, 36 Mo. 35.) But it appears from the pleadings that there was a consideration for the promise, though no formal statement of it is made. The pleader does not say that defendants' promise was in consideration of this or that, but it appears that they were to receive seven, eight, or ten cents a pound, according to the time of delivery, for transporting the freight embraced in the contract of plaintiff and Fouts & Russel; that is to say, that plaintiff turned over to them this contract, which called for ten cents, and they agreed to transport the freight, and, if it was delivered before a certain time, to pay him a part of the freight money. All this the petition shows; and if the facts do not import a consideration, it would be difficult to make a valid agreement to underlet a job. But it afterward appears that the moving consideration was not stated at all in the petition—only alluded to—and the defendants, upon the trial, sought to take advantage of the fact by objecting to the introduction of the contract in evidence. Their objection was overruled, and this error is urged as the second ground for reversing the judgment.

By inspecting this contract it seems that the plaintiff agreed to sell to defendants his freight train, cattle, and appurtenances, "in consideration of which" defendants agreed to pay a certain price; "and for further consideration" they agreed to assume the plaintiff's contract with Fouts & Russel upon the terms and conditions heretofore spoken of; "and for further consideration," to do certain freighting, upon certain terms, for the plaintiff directly. Thus it appears that the essence or main object of the contract was the sale of plaintiff's property to defendants. As a consideration for this property, the defendants agreed to do three things: First, to pay money; second, to assume the Fouts & Russel contract; third, to do another job for plaintiff. These three agreements are distinct, and not dependent on each other. One or two of them may be performed and the other violated, and an action would lie for its violation. In such action is there any reason for setting up the other agreements? None whatever. Hence, there is no variance, because they are not

Kercheval v. King et al.

set out in the pleading; they have nothing to do with this case. But that part of the contract providing for the sale of the property has a direct connection with each of the several agreements mentioned as the consideration for such sale. One is the consideration for the other, and should have been so set out in the petition. Not having been so set out, and the objection not having been made before the trial, can it be raised in this way?

To enable us to see the condition of the parties at the time, let us look again to the issues made by the pleadings. The defendants admit the contract between them and the plaintiff, counted upon in the petition, and set it forth with somewhat more particularity than the petition itself; admit that they were to pay plaintiff for his freight train, cattle, and other things mentioned in the agreement; and further, to assume for plaintiff his contract with Fouts & Russel, and perform the conditions thereof, to-wit, etc.; and after admitting and denying other things, aver "that in and by said contract filed with the original petition (the contract in suit), said plaintiff, for good and valuable consideration therein mentioned, agreed to sell and deliver to them (defendants) his freight train, cattle, and all appurtenances, consisting of seventeen wagons and 137 head of oxen, together with wagon-sheets, ox-bows, yoke-chains, new kits, and all the appurtenances in any way belonging to the same," and claim damages for the want of prompt delivery of the property. The plaintiff does not deny this averment in relation to the sale of the property, and therefore admits the same, but does deny any liability for its non-delivery.

Now, I can not see what necessity there was for offering the contract in evidence at all. Every part of it bearing upon the case had been set out by one party or the other, and admitted by the opposite party, and reading it to the court or jury could only be a matter of convenience. By reference to the pleadings, all that was necessary to know of it could be found admitted by both parties; and the defendants could not have been prejudiced by reading it in evidence, for it was before the court, consideration and all, previous to its being so read.

Berrel et al. v. Davis.

The same remark will apply to the admissibility of the freight contract between the plaintiff and Fouts & Russel, assumed by defendants. It was claimed that it varied from the one named in the petition in this, that the petition stated that the payment for the freight was to be in clean gold dust, while the original contract provided for payment in greenbacks — the agreement to pay in gold dust being indorsed upon it, and signed only by the plaintiff. Defendants now claim that this charge formed no part of the contract, and hence the variance. But when they answered the petition they admitted that it was a part of the contract. They settled with Fouts & Russel according to the terms of the indorsement. It was expressly proved to have been made in the presence of and by agreement of both parties; and from one end of the record to the other, by both plaintiff and defendants, it was treated as a gold-dust contract. It is too late now for the defendants to deny their own express and implied admission during the whole of their transactions with the plaintiff and the whole progress of this cause.

The judgment of the District Court is reversed and that of the Common Pleas affirmed. The other judges concur.

HARVEY J. BERREL *et al.*, Respondents, *v.* C. A. DAVIS, Appellant.

1. *Practice, Civil — Tender of payment — Constable — Justice — Construction of statute.* — Where defendant, under section 19, chapter 180, Gen. Stat. 1865, made tender of the amount afterward recovered against him, exclusive of costs, to the constable, but by his directions paid the sum over to the justice, he complied with the spirit of the statute, and was not liable for costs of suit.

Appeal from Fifth District Court.

Broadbuss & Sloan, for appellant.

Payment to the justice, under direction of the constable, was in effect payment to the constable within the meaning of the statute. (2 Greenl. Ev. §§ 600-603; 6 Bacon's Abr., 6th ed.)

Asper & Pollard, for respondents.

No error was committed by the court below, because no deposit was made with the constable as required by law. (Gen. Stat. 1865, ch. 180, §§ 17-19.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs sued defendant on an account before a justice of the peace. After summons served, and before trial, defendant tendered to the constable the amount of the account which he admitted to be due, and also the costs that had accrued up to that time. The constable, instead of taking the money himself, directed the defendant to pay it to the justice, which he did accordingly. In the justice's court the plaintiffs obtained judgment for an amount in excess of the sum tendered and deposited; but on appeal to the Circuit Court, and in a trial anew, the judgment was for that amount, and no more. The Circuit Court rendered judgment against the defendant for the amount found in the verdict, and also for all costs which had accrued in both courts, without regarding the money paid to the justice on the direction of the constable. It is contended in this court that the payment of the money to the justice was unauthorized, and did not stop the accruing of the costs, interests, etc. If it was a simple and direct payment to the justice, this position is probably correct.

At common law, a tender puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs when sued for the debt. (*Berthold v. Reyburn*, 37 Mo. 586.) But the hypothesis of tenders, on which the case has been argued to some extent, has no essential bearing, as it must mainly be determined by the provisions of the statute. The statute declares that if, at any time after the commencement of suit, the defendant pay to the constable the full amount which he owes the plaintiff up to that time, together with all costs then accrued, and the suit be not discontinued, but be further prosecuted, and the plaintiff shall not recover judgment for a larger sum, exclusive of interest

Berrel et al. v. Davis.

and costs since accrued, than the sum so paid to the constable, then the plaintiff shall pay all costs accruing after such payment. (Gen. Stat. 1865, ch. 180, § 19.)

When the defendant offered the amount to the constable it was his duty to receive it, and had he refused he would have been liable for all injuries which the defendant sustained subsequently in consequence thereof. But there was no refusal. He simply directed the party to pay it to the justice; and, making such payment in that manner, the party acted according to the directions and order of the constable. It was a reception by the constable, paid to another person at his request and for his convenience, and which would have rendered the constable liable at the demand of the plaintiffs. Where a debtor owes money to a creditor, and presents the same to the creditor in payment, and the creditor directs him to a third person, it will hardly be contended that this would not amount to a discharge of the debt and a payment to the creditor himself. The doctrine contended for by the plaintiffs is sheer technicality, and is founded upon a strict adherence to the letter of the statute—ignoring the reason and the substance. It goes but skin-deep, and does not penetrate into the meaning. *Qui haeret in litera haeret in cortice.*

To say that there is no other way of depositing the money without paying it absolutely into the hands of the constable is giving the statute a very narrow construction. To all intents and purposes the money was here paid to the constable—the justice was accountable to him for it—and because that officer saw fit to commit it to the custody of the justice, the defendant ought not to be injured. He had done his full part in complying with the law, and the full amount which the jury found due the plaintiffs was in *legis custodia*, ready to be handed over to them.

The judgment should be reversed and the cause remanded. The other judges concur.

McCrary v. Ashbaugh, Adm'r of McCormick.

ELIJAH MCCRARY, Respondent, v. JAMES H. ASHBAUGH, ADM'R
OF JOHN MCCORMICK, Appellant.

1. *Administrator—Certificate of deposit, liability on—Principal and agent.—*

When goods were to be paid for by depositing the amount in a certain bank to order of the vendee, but, by mistake, it was deposited in the name of his agent, such deposit was a discharge of the vendee; and the administrator of the agent's estate was liable for the sum to the principal, even though, under a misapprehension of the rights of claimants, he may have paid it to another party. He should have inventoried the certificate of deposit, and left the court to determine to whom the money belonged.

Appeal from Fifth District Court.

Bassett & Van Waters, for appellant.

A person can not be made a bailee or depository against his will and consent. (2 Pars. on Cont. 96.)

Pike, Tutt & Kirk, for respondent.

The deposit having been made in the name of the agent, and the certificate of deposit sent to him, were equivalent to payment of the money to him, for his principal, and he was responsible to his principal for the money so deposited; and if he was liable, his estate must be.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff presented a demand to the Probate Court of Buchanan county for allowance against the estate of McCormick, deceased, for money paid by one Murphy to said McCormick for plaintiff. This demand was rejected by the Probate Court, and on an appeal to the Circuit Court that judgment was reversed. The District Court affirmed the judgment of the Circuit Court, and the case is brought here.

The record discloses substantially that during the year 1865 McCormick was plaintiff's chief clerk in a store at Nebraska City, and, whilst acting as such clerk, sold a bill of goods belonging to plaintiff to one Murphy, amounting to the sum of \$263; that Murphy was to pay for the same by depositing that sum in a bank at St. Joseph, Mo., where plaintiff lived, to plain-

McCrary v. Ashbaugh, Adm'r of McCormick.

tiff's credit; that in a short time after the sale was made, Murphy, through his agent, deposited the money in a branch of the Bank of the State of Missouri at St. Joseph, but, by mistake, the deposit was made in the name of McCormick instead of plaintiff. The certificate of deposit was sent to McCormick, who at once declared that it was wrong—that the money was plaintiff's, and not his. In about ten days thereafter McCormick died, and Ashbaugh, the defendant, administered on his estate. The money remained in the bank on deposit for some months after the death of McCormick, when Ashbaugh, the administrator, withdrew it on his check and paid it over to Murphy—for what purpose does not appear. It seems that the certificate was not inventoried among the assets of McCormick.

The question of the liability of McCormick's estate depends on whether the payment of the money in the bank, by McCormick's instructions, operated as a discharge of Murphy on his purchase. The contract was that the goods were to be paid for by depositing the money in bank. When the money was so deposited by Murphy, he had complied with its terms, and it is obvious that no action would have been maintainable against him. What a principal does by his agent, he does by himself; and the contract by McCormick bound the plaintiff in this case. It was immaterial that, by mistake, the certificate of deposit was taken in the name of McCormick when it should have been in the name of the plaintiff.

The plaintiff was the beneficial owner, and McCormick only held it in the attitude of a trustee, and the plaintiff could have recovered it at any time. From the time the money was received it belonged to plaintiff. The custody of the agent was the custody of the principal, and any use made of it thereafter by the agent was a conversion. The administrator is the representative of the deceased, and his acts bind the estate. He should have inventoried the certificate, and left it for the court to determine to whom the money belonged, and should not have undertaken to constitute himself the sole arbiter in the matter. It is unnecessary to go into an examination of the instruction. I see nothing objectionable in the action of the Circuit Court.

The judgment should be affirmed. The other judges concur.

HENRY C. LITTLE, Plaintiff in Error, v. ISAAC N. PAGE, Defendant in Error.

1. *Sale—Property may be reclaimed, when.*—A. sold a certain mare to B., with the express agreement that, until the whole of the purchase money was paid over, the title should remain in A. Before payment of the purchase money due, and without the knowledge of A., B. sold the mare. *Held*, that B. had no vested right in the mare, and could convey no title by sale; and A., being guilty of no laches, might reclaim the property from an innocent purchaser without notice.

Error to Fifth District Court.

E. & J. M. Kinley, for plaintiff in error, relied on 2 Kent's Com., 10th ed., p. 657, § 498; *Hugh v. Palmer*, 5 Johns. Ch. 437; *Whitewell v. Vincent*, 4 Pick. 449; *Carlisle v. Gardner*, 2 Hill., N. Y., 345; *Russell v. Morrow*, 22 Wend. 661; *DeWolf v. Babbitt*, 4 Mason, 294; *Cox v. Hardin*, 4 East. 211; *Brown v. Hudgson*, 2 Campb. 36; *Browning v. Wendham*, 5 Wend. 189; *Haggerty v. Palmer*, 6 Johns. 437; *Clint. N. Y. Dig.* 2917, §§ 34–6, p. 1441, §§ 113–15, 119, and authorities there cited; 1 Pars. on Cont., 5th ed., p. 537; 1 Chit. Blackst. 313; *Hussey v. Thornton*, 17 Mass. 606; 3 U. S. Dig. 368, §§ 228–31; *Marston v. Baldwin*, 17 Mass. 606; *Hutchinson v. Watkins*, 17 Iowa, 475; *Wait v. Green*, 35 Barb., N. Y., 585; *Saltus v. Everett*, 20 Wend. 267.

H. S. Kelley, for respondent, relied on *Parmelee v. Catherwood et al.*, 36 Mo. 479, and authorities there cited; *Kitchell v. Vanadar*, 1 Blackf. 356; *Elliott v. Armstrong*, 2 Blackf. 211; *Shireman v. Jackson*, 14 Ind. 459; *Thomas et al. v. Winters et al.*, 12 Ind. 322, and authorities cited; *Plummer v. Sherby*, 16 Ind. 380, and authorities cited; *Hanway v. Wallace*, 18 Ind. 377, and authorities cited; *Dunbar v. Rawles*, 28 Ind. 255, and authorities cited; 19 Maine, 154; 48 Ind. 501; 49 Ind. 213; 3 Cush. 257; 4 Cush. 195; 15 Iowa, 277; *Forbes v. Marsh*, 15 Conn. 384; 24 Ind. 427; 2 Pick. 512; 3 Gray, 545; 5 Gray, 306; 7 Gray, 158; 8 Gray, 159; 1 Pars. on Cont., 5th ed., p. 537, and notes; *Sto. on Sales*, § 313, and authorities there cited;

Little v. Page.

4 Wash. C. C. 588; 4 Mason, 294; 9 N. H. 298; 12 N. H. 299; 2 Saund. 418; 2 Pick. 512; 3 Mich. 9; 8 Maine, 25; 14 Ind. 460; 28 Ind. 225, 231.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought in the Andrew County Circuit Court, under the statute for the claim and delivery of personal property, to recover possession of a mare. The record discloses the following facts: The defendant Page, being the owner of the mare in controversy, sold her to one Hall for the sum of \$100—Hall paying \$50 down, and agreeing to pay the balance within three months. By the terms of the contract, Hall was authorized to get the mare, and take her to and keep her on the premises, and under the control and in the possession of one Cobb (with whom Hall then made his home), until she was fully paid for. By agreement between the parties, the mare was not to be Hall's, but was to remain the property of Page until paid for, Hall having the right to use and break her. The mare was taken to Cobb's premises, and remained there three or four weeks, when Hall took her to St. Joseph and sold her to one Bullmore, without the knowledge or consent of either Page or Cobb, and without paying the balance of the purchase money. Bullmore sold the mare to plaintiff Little, who, it appears, knew nothing of the right or claim of Page. Upon hearing of the sale of the mare by Hall to Bullmore, Page went immediately in search of her, and endeavored to reclaim her; but Bullmore had sold her to plaintiff Little, and he failed to find her. Afterward the mare voluntarily returned to Page's premises, and he took possession of her, claiming her to be his until she was paid for, and refused to give her up to Little until he received the balance due from Hall, and which Little refused to pay.

The case was tried before the court, without the intervention of a jury; and upon the foregoing facts the court, for the plaintiff, declared the law to be "that if Page sold the mare to Hall, and gave him possession of her, Hall could pass a good title to her to an innocent purchaser, notwithstanding the condition between him and Page had not been complied with." The court refused, at

Little v. Page.

the instance of defendant, to give the following declaration of law: "That if the court should find that Page sold the mare to Hall for \$100, and received \$50, and the balance to be paid in three months; that Hall was to take her to Cobb's, to remain in Cobb's control and on his premises until paid for; that said Hall sold the mare without paying for her, and there was still any part of the purchase money unpaid, and the defendant Page was guilty of no laches, the plaintiff can not recover, although he may have bought the property of Hall's vendee without notice of defendant's claim on it or right thereto."

There was then a finding and judgment for the plaintiff, which was reversed in the District Court. The record shows beyond all controversy that the bargain between Page and Hall constituted a conditional sale; and it is a familiar rule that, until the conditions are fulfilled or complied with, the title does not pass.

In *Parmelee v. Catherwood* (36 Mo. 479) this court held that possession of personal property was presumptive evidence of title; but that, where a sale was made and possession given to the purchaser, yet if, by express agreement, the title was to remain in the sellers until the price was paid, the right of property was not vested in the purchaser until payment; and that, where the vendor had been guilty of no laches, he might reclaim the goods from a third party who took them in good faith and without notice.

Story, in his treatise on sales, holds the doctrine that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and his creditors; and, also, if guilty of no neglect, the vendor may recover the goods so sold and delivered even from an innocent purchaser. And in support of this position he cites an overwhelming number of cases. (*Perk. Sto. on Sales*, § 313, note 2, and note 1 on p. 364.)

The cases are so numerous sustaining the same proposition, and the law appears to be so well established, that it could subserve no useful purpose to attempt a review of them. In the

Parker v. Hannibal & St. Joseph R.R. Co.

case at bar, possession was not given to Hall. The real possession, by agreement of all parties, was in Cobb, and Hall had the privilege of using the mare for the purpose of breaking her till the time arrived when, by the fulfillment of the conditions, the title should vest in him; that he violated his contract, and acted in bad faith, can not impair the right of Page. When he took the mare from Cobb's premises and sold her, his possession was wrongful, and did not invest him with any additional power. He had no vested right himself, and was incapable of transmitting any to another person. The defendant clearly proved the terms of the contract, and exercised all the diligence he could to retake and reclaim his property after the tortious sale.

The Circuit Court erred in giving plaintiff's instruction and refusing the instruction asked for by defendant, and the decision of the District Court in reversing its judgment must be affirmed. The other judges concur.

GEORGE PARKER, Respondent, v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Practice, Civil—Appeal—Supersedeas.*—In ordinary cases the effect of perfecting an appeal is to render inoperative the judgment of the lower court. The judgment is suspended, and no proceedings can be had under or by force of it, after the appeal is actually taken.
2. *Practice, Civil—Executions, stay of—Construction of statute.*—The sixty-seventh, sixty-eighth, and sixty-ninth sections of chapter 160, pp. 648-9, Gen. Stat. 1865, simply give a party the privilege, and enact the means, of taking steps in vacation to have the further proceedings on an execution stayed until he can be heard in court as to whether it should be set aside or quashed. The proceeding is not exclusive, and does not prevent the usual resort to a motion to set aside or quash at the return term in open court.
3. *Practice, Civil—Appeal—Judgments on motions.*—The Supreme Court will review the decisions of the inferior courts upon judgments rendered on motion.
4. *Practice, Civil—Appeal—Judgment on motion to quash—Bond—Supersedeas.*—An appeal from a judgment overruling a motion to quash an execution operates as a *supersedeas* of the judgment upon which the execution issued, upon the filing of a sufficient bond; and in such case an order could be entered of record, staying the execution till the appeal is determined. But

Parker v. Hannibal & St. Joseph R.R. Co.

the bond must comply with the requirements of the statute (Gen. Stat. 1865, § 12, p. 685), and be conditioned for the performance of the judgment as well as the payment of all damages and costs which may be awarded against the appellant in the Supreme Court. If not so conditioned, it does not stay the execution or have the force and effect of a *supersedeas*.

5. *Executions—Sales, when set aside—Inadequacy of consideration—Misunderstanding of parties.*—The mere fact that lands are sold under execution for an inadequate price would not of itself be sufficient ground to set aside the sale. But where the evidence showed that the property was sold for a price grossly inadequate, after the hour in the day when other sales were made and competition was free, and without the consent of defendant's counsel, the sale should be set aside on motion. To retain property sold for a grossly inadequate price, the vendee should be guilty of no misconduct, and should act with the most exact good faith.

Appeal from Fourth District Court.

Carr, and Hall & Oliver, for appellant.

I. This is in the nature of an equitable proceeding praying summary relief, and this court will review both the facts and the law.

II. The filing and approval of the recognizance for an appeal to the Supreme Court, and granting the same, operated as a *supersedeas* of said execution. (R. C. 1855, ch. 128, § 12, p. 1287.)

III. There was a gross inadequacy of price in this case. This being true, "courts will require that there be a strict regularity in the proceedings." (Nelson v. Brown, 23 Mo. 21; 6 Wend. 524.) It is the policy of the law that sheriffs' sales should be conducted with fairness and regularity; and if a purchaser participates in any unfairness or irregularity, it will vitiate his purchase. (Nelson v. Brown, 23 Mo. 14; Neal v. Stone, 20 Mo. 294; Wooton v. Hinkle, *id.* 290; Stewart v. Nelson, 25 Mo. 309; Miltenberger v. Morrison *et al.*, 39 Mo. 71.)

IV. Ruby, the purchaser, was the agent of the respondent, and, as such, he is not regarded as a *bona fide* purchaser. Whatever fraud or irregularity will vitiate the purchase in the hands of the one will likewise vitiate in the hands of the others. (Gott v. Powell *et al.*, 41 Mo. 416; Stewart v. Croes *et al.*, 5 Gilman, 442; Day *et al.* v. Graham *et al.*, 4 Gilman, 389; Groff v.

Parker v. Hannibal & St. Joseph R.R. Co.

Jones, 6 Wend. 524; Han. & St. Jo. R.R. Co. v. Brown & Lander, 43 Mo. 294.)

Prewitt, for respondent.

I. The execution takes its validity from the original judgment. A recognizance only operates as a *supersedeas* to the judgment appealed from. In this case the court overruled the motion to quash, and gave judgment in favor of plaintiff for costs. Hence, the recognizance only prevented plaintiff from taking out execution for the costs of the motion to quash until the judgment was affirmed by the Supreme Court. The recognizance was no security for the debt for which judgment was originally given. (Gen. Stat. 1865, §§ 11, 12, 17, p. 648; Ruby v. Han. & St. Jo. R.R. Co., 39 Mo. 480.)

II. A mere motion to quash does not enjoin the execution. If defendant desires to enjoin the sheriff until his motion to quash can be heard, he must resort to a court of chancery for an injunction, or proceed in the manner pointed out by the statute to stay it. (Gen. Stat. 1865, §§ 6-9, p. 648.)

III. If a motion to quash does not enjoin the sale, an appeal from the judgment overruling the motion to quash can not have that effect.

IV. Sales will not be set aside for mere inadequacy of price. (Hammond v. Scott, 12 Mo. 8.)

V. The sale was made between the hours prescribed by law. (Gen. Stat. 1865, § 45, p. 645.)

WAGNER, Judge, delivered the opinion of the court.

The defendant filed its motion to quash an execution in the Macon County Circuit Court, at the return term thereof, on the morning of the day on which property was to be sold to satisfy the same. By consent of counsel the motion was at once taken up, and overruled by the court. To the ruling of the court the defendant at the time excepted, prayed for an appeal, filed its affidavit and recognizance, and the appeal was perfected.

It seems that there was an attempt made between the respective attorneys who represented the parties to arrange and compromise

Parker v. Hannibal & St. Joseph R.R. Co.

the debt which the property was levied upon to satisfy, and that it was mutually agreed upon between them that there should be no sale at the time other property was sold on execution that day. Carr, the defendant's attorney, swears that it was his opinion that the appeal operated as a *supersedeas*, and that his understanding of the agreement was that there was to be no sale at that term of the court, and that the matter was to rest until the result of the pending appeal was determined; while Dysart, the attorney for the plaintiff, who had the management of the execution, states that he did not intend that the sale should be entirely stopped, but only postponed to await the result of their negotiations. The sheriff's sale took place at half-past one o'clock, but the lands levied on to satisfy this execution were not sold at that time. After the regular sales were over and the bidders had dispersed, at about half-past four o'clock in the afternoon, Ruby, who acted as agent for the plaintiff, ordered the sheriff to proceed to sell the land, which he did accordingly. The defendant's attorney, being notified thereof when he was busily engaged in court, paid no attention to it. Under the sale, two hundred and forty acres of land, worth from eight to ten dollars an acre, were sold at a fraction over nine cents per acre—Ruby being the sole bidder and purchaser. A motion was then filed to set the sale aside, which was overruled, and exceptions duly saved. After an affirmance of the ruling of the Circuit Court in the District Court, the defendant appealed.

Two questions are presented: First, whether the appeal taken from the judgment of the court overruling the motion to quash operated as a *supersedeas*, and stayed all further proceedings on the execution; and, second, whether the court erred in refusing to set aside the sale. In ordinary cases the effect of perfecting an appeal is to render inoperative the judgment of the lower court. The judgment is suspended, and no proceedings can be had under or by force of it, after the appeal is actually taken. This position is not denied by the counsel for the respondent, but he contends that, as the execution derives its force from the judgment, nothing but an appeal from the judgment itself will have the effect of suspending the execution.

Parker v. Hannibal & St. Joseph R.R. Co.

It is further argued that the statute concerning executions has pointed out a method by which executions may be stayed in the Circuit Court, and that that method has not been pursued in the present case. The sixty-seventh section of the statute referred to provides that if any person, against whom any execution shall be issued, apply to any judge of the court out of which the execution or order of sale may have been issued, by petition, verified by oath or affirmation, setting forth good cause why such execution ought to be stayed, set aside, or quashed—reasonable notice of such intended application being previously given to the opposite party, his attorney of record, or agent—such judge shall thereupon hear the complaint. The sixty-eighth section provides for giving recognizance for the debt, damages, and costs, where the judge shall be of the opinion that the execution should be stayed, set aside, or quashed; and the sixty-ninth section directs that the judge shall return such petition and proceedings thereon, duly certified, to the court out of which the execution was issued or order of sale is made returnable, and the clerk of the court shall enter the same upon his motion docket; that the court shall hear and determine the same in a summary way, according to right and justice, and may award a perpetual stay of such execution or order of sale, or may order the execution or order of sale to be enforced.

This statute simply gives the party the privilege of applying to a judge in vacation or at chambers, and procuring a preliminary or interlocutory order for the stay of an execution upon certain terms. The order made by the judge is not final; but his actions and proceedings are certified to the court, for hearing and judgment, in term time. Nothing is said of the effect of an appeal from the final judgment of the Circuit Court on the motion.

This statute enacts a means by which a party may take the initiatory steps in vacation to have the further proceedings on an execution stayed till he can be heard in court as to whether it should be set aside or quashed. But the proceeding is not exclusive, and does not prevent the usual resort to a motion to set aside or quash at the return term in open court.

This court will review the decisions of the inferior courts upon

Parker v. Hannibal & St. Joseph R.R. Co.

judgments rendered on motions (Bruce v. Vogel, 38 Mo. 100; Parker v. Waugh, 34 Mo. 340); and the question now is, what part of the proceedings are suspended or stayed when the appeal is taken from a judgment on a motion? The practice act enacts that the appeal shall stay the execution when the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party in a penalty in double the amount of whatever debt, damages, and costs, or damages and costs, have been recovered by such judgment, together with the interest that may accrue thereon, and the costs and damages that may be recovered in the Supreme Court on the appeal, conditioned that the appellant will prosecute his appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court shall direct the Circuit Court to give; and that, if the judgment of such court, or any part thereof, be affirmed, he will comply with and perform the same as far as it may be affirmed, and will pay all damages and costs which may be awarded against the appellant in the Supreme Court.

It is true that the statute here speaks literally of the debt, damages, and costs which have been recovered by the judgment—meaning, unquestionably, the judgment from which the execution issued.

It has been the practice in a large portion of the State, where an appeal was taken from a judgment overruling a motion to quash, to regard it as a *supersedeas* upon the filing of a sufficient bond. In such cases an order is generally entered of record, staying the execution till the appeal is determined; and this is the proper course to pursue. But the bond in such a case should not be a mere bond to pay the damages and costs awarded against the appellant by the Supreme Court. It should be a bond to fully indemnify the respondent, insuring him the payment of the debt, damages, and costs which he has recovered by his judgment. When this is done, the court should stay the execution, pending the appeal, and not compel the party to institute a new suit by

Parker v. Hannibal & St. Joseph R.R. Co.

injunction, to accomplish his object, when it is just as well secured by the bond filed.

In looking into the bond given by appellant in this case, I find it deficient. There is no indemnity to the respondent to secure the debt, damages, and costs recovered in his judgment. The only undertaking is to be responsible for the damages and costs awarded by the appellate court; and the vital part of the statutory provision, which gives a *supersedeas* because the plaintiff in the judgment is secured, is left out. The bond, therefore, did not and ought not to be allowed to stay the execution and have the force and effect of a *supersedeas*.

The next question is, did the court err in overruling the motion to set aside the sale? The mere fact that the lands sold for an inadequate price would not of itself be a sufficient ground to set the sale aside. But when a man obtains an estate worth thousands for a mere pittance—a few dollars—if he is permitted to retain the same, it is necessary that he should have been guilty of no misconduct, and that he should have acted with the most exact good faith.

It is conceded by all that the sheriff was ordered not to sell on the execution. Whilst it was the understanding of one party that the postponement was to be final and amount to a complete abandonment of the sale during the term, the other party says that he intended the suspension to be merely temporary. It was a mutual misapprehension; and we must only examine into the result. If defendant's attorney was not misled, or was heedlessly misled, he can not take advantage of his own inattention. But the fact is patent that the sale was held up by the directions given to the sheriff, and did not take place when the other property was sold, and while the bidders were assembled. The property was not sold in the usual manner; by order of the plaintiff's attorney, it was not put up when other lands were sold; and when the sales were completed the people went away. Afterward, late in the evening, to the surprise of the defendant's attorney, and when there were but few persons about the courthouse, Ruby, who acted as agent for the plaintiff, insisted on the land being sold, which was done accordingly; and by this

Watson v. Buchanan County.

means he purchased an estate worth over \$2,000 for less than \$25. When property is thus sacrificed, it is the duty of the courts to narrowly scan all the attendant circumstances. Had the sale been made when the other property was sold on that day, and when the competition was free, we would not disturb it in consequence of the inadequacy of consideration; but, in view of all the facts, the sale ought not to be permitted to stand, and the court should have set it aside.

The judgment will be reversed and the cause remanded, but the appellant will be ordered and adjudged to pay the costs. The other judges concur

JAMES WATSON, Plaintiff in Error, v. BUCHANAN COUNTY,
Defendant in Error.

1. *Military bounties—Buchanan county—County Court—Orders, construction of—Right of volunteers to balance of bounty money.*—Under authority of an act of the General Assembly (Sess. Acts 1863-4, p. 39), the County Court of Buchanan county, on the second day of August, A. D. 1864, made a general appropriation of the sum of \$120,000, to be applied to the payment of bounties to soldiers credited to the enrollment of the county. Subsequently, on the twentieth day of the same month, said court adopted a further order establishing a bounty of \$200 to be paid to volunteers credited to the county under the "late call." The United States made four "calls" for troops in the year 1864—in February, March, July, and December, respectively. *Held*, that a soldier who volunteered under the December call was not accredited to the county under the "late call," within the meaning of the order, and was, therefore, not entitled to bounty under that order. Under these circumstances, the fact that a balance of the appropriation remains undisposed of does not give a soldier enlisted under the December call any legal interest in such balance.

Error to Fifth District Court.

T. A. Green, for plaintiff in error.

W. S. Everett, for defendant in error

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to recover the sum of \$200, military bounty money alleged to be due the plaintiff from the county of

Watson v. Buchanan County.

Buchanan. The petition is demurred to as insufficient in law on two specified grounds. The Circuit Court sustained the demurrer, and rendered judgment for the defendant. This judgment was affirmed in the District Court, and the plaintiff brings the case here by writ of error.

The statute (Sess. Acts 1863-4, p. 39) authorizes the respective county courts of the State "to give such bounties as they think proper to soldiers who may volunteer in the Missouri volunteers, in the United States military service." Under the authority of this act, the Buchanan County Court, August 2, 1864, made a general appropriation of the sum of \$120,000, to be applied in the payment of bounties to soldiers "credited to the enrollment of the county;" but the order fixes no amount to be paid to any individual soldier. It merely establishes a military bounty fund, to be drawn on as might thereafter be provided. On the 20th of the same month the court adopted a further order to carry the first into practical effect, and thereby fixed the terms and conditions upon which the contemplated bounty should be paid over to individual volunteers, and the amount to be paid to each respectively, to-wit: \$200. It further provided that the fund should be concentrated in the hands of the county treasurer, whence it was to be distributed by him to volunteers who should be or should have been "accredited to the county of Buchanan on her *quota* under the late call," and who should present to the treasurer a certificate of that fact, duly authenticated by the county seal. This order fixes the mode and means of raising the proposed fund, and goes extensively into details not important to be here recapitulated. The petition shows that the United States made four calls for troops in 1864—namely: one in February, one in March, one in July, and one in December—and that the plaintiff volunteered under the December call, and that he was thereon "accredited to said county." Does this satisfy the condition upon which the \$200 bounty money was to be paid to individual volunteers, as provided in the order of August 20, 1864, namely: that the accrediting should be upon the "late call?" That is the question submitted for adjudication.

Whether the court, in the order of August 20, had in mind

Watson v. Buchanan County.

and intended to provide alone for the call of July, as the "late call" mentioned in the order, or whether it had in mind and intended to provide for the February and March calls as well, might be a question. In other words, it might be a question as to whether the word "call," as used in the order, should be construed in the singular or plural number. But it is difficult to discover any reasonable ground for maintaining the proposition that the call or calls mentioned in the order as then existing and "lately" made, included, or were intended to include, a call not then in existence, and which was not made till months after, and which the court had no power to foresee would ever be made. There is nothing in the framework or phraseology of the order warranting such prospective application of it. Confusion on this point would seem to have arisen from regarding the order of August 20, which merely established a fund to be drawn upon for a particular purpose, as vesting in the volunteer a specific personal right; whereas the order of August 20 defined the rights of the individual soldier, and by that his pretensions must be judged. That clearly had reference to past calls, and not to calls which might thereafter be made. The demurrer, therefore, on that point was well taken, and must be sustained. The other point raised by the demurrer is substantially confessed in the argument. The alleged declarations and promises of Judge Schreiber are relied upon as having a tendency to show, by his subsequent acts, how he must have understood the order adopted by the court in August, rather than as original, independent grounds or causes of action. Besides, the supposed promise of the county, alleged to have been made by Judge Schreiber, is not shown by the pleadings to be based upon any consideration. The averments show a promise, but no consideration—a mere *nudum pactum*.

But it is unnecessary to pursue the matter, as the individual acts of Judge Schreiber are relied upon merely as aids to a proper understanding and true construction of the August orders of the County Court, and not as in themselves sufficient to warrant a judgment against the county.

It is urged that a considerable balance of the \$120,000 bounty

State of Missouri ex rel. Turner v. Fitzgerald.

fund remains unused in the hands of the county officers. That is a matter for the county to look after. The supposed fact has no material bearing upon the issues of law raised by the demurrer. It does not follow from the fact of a balance that the plaintiff has any legal interest therein.

For the consideration stated, the judgment of the District Court must be affirmed. Judge Wagner concurs. Judge Bliss, having been of counsel, not sitting.

STATE OF MISSOURI *ex rel.* HORATIO N. TURNER, Appellant, v.
MICHAEL FITZGERALD, Respondent.

1. *Quo warranto*—City council of St. Joseph—Title to office in, triable in Circuit Court—Construction of charter.—In the absence of express words to that effect, the sixth section of article II of the charter of the city of St. Joseph did not make the judgment of the council board of that city final and conclusive as to the qualifications and elections of its members; and by virtue of section 1, chapter 157, Gen. Stat. 1865, the Circuit Court of Buchanan county had jurisdiction to determine the right of a councilman to office, on an information in the nature of a *quo warranto*.

Appeal from Fifth District Court.

Bassett & Van Waters, and *Bennett & Pike*, for appellant.

I. The right given to the city council by charter to judge of the election, returns, and qualifications of its members does not exclude the jurisdiction of the common-law court therein, and certainly not where the jurisdiction by statute is expressly conferred on the Circuit Court to determine the right of any person to hold any office or franchise, who has usurped, intruded into, or unlawfully holds and executes such office or franchise. (Gen. Stat. 1865, ch. 157, § 1, p. 632; *ex parte* Heath *et al.*, 3 Hill. 50.)

II. The right to judge of the qualifications, elections, and returns of its members, granted to the city council by charter, is a delegated limited judicial power and authority, and does not exclude the jurisdiction of courts over the same, which can only

State of Missouri ex rel. Turner v. Fitzgerald.

be done by express and positive enactments. (*Ex parte* Heath *et al.*, 3 Hill. 50.)

III. This is not an attempt by relator, Turner, to contest the election of Fitzgerald; but it is an action, under the first section of chapter 157, Gen. Stat. 1865, in relation to an information in the nature of *quo warranto*, to determine the question whether the said Fitzgerald has usurped the said office of councilman and unlawfully holds it. (*The People v. Tibbetts*, 4 Cow. 381; *Commonwealth v. Fowler*, 10 Mass. 291.)

Hall & Oliver, for respondent.

I. Under the charter of the city of St. Joseph, the city council is the sole judge of the election, returns, and qualifications of its members (1 Kent, 234), and no other authority is at liberty to interfere. (*Cooley's Const. Lim.* 133; *People v. Mahoney*, 13 Mich. 481; 17 Md. 309; *Lamb et al. v. Lynd et al.*, 44 Penn. St. 336; *Ewing v. Filley*, 43 Penn. St. 389; Charter of City of St. Joseph, § 6, p. 62.)

II. The office of city councilman is a legislative office, and the final decision of the election, qualification, and return of a councilman, as well by parliamentary as by legislative provisions, vests in the city council itself, and the court can not interfere. (44 Penn. St. 336, 389; *Cooley's Const. Lim.* 624.)

III. Where there are two claimants under the same election for the same office, which only one of them can have, it constitutes a case of contested election, which is to be tried in the mode especially provided for in such cases, and not by the ordinary forms of judicial process. The mode of trying contested elections of councilmen of St. Joseph is especially provided for in its charter, and in such contests the courts have no jurisdiction. (44 Penn. St. 336; 3 Johns. 79; 1 Metc. 538; *Cooley's Const. Lim.* 634; *Bradshaw v. Sherwood*, 42 Mo. 184.)

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a writ of *quo warranto* to determine by what right the respondent exercises the

State of Missouri ex rel. Turner v. Fitzgerald.

office of councilman of the city of St. Joseph. The proceeding was instituted in the Buchanan Circuit Court, and is brought here by the relator, on appeal from the District Court.

The information was demurred to on the ground, among other causes, of want of jurisdiction in the Circuit Court. That is the only point pressed upon our attention or relied upon in support of the demurrer. The question thus raised involves a construction of section 6, article II, of the charter of the city of St. Joseph, passed February 22, 1851. This section provides that "the board of councilmen shall judge of the qualifications, elections, and returns of the members thereof." In pursuance of this enactment, the board passed upon the election and qualification of the respondent as a member of that body, and admitted him to a seat therein. It is therefore insisted by the respondent that his right to the office has been adjudicated by the only authority legally competent to pass upon the case. In other words, it is maintained that, under the charter, the judgment of the council board is final and conclusive; and that the Circuit Court, therefore, has no jurisdiction in the premises.

The authority of the board of councilmen, in the first instance, to pass upon the questions involved respecting the election and qualification of the respondent, is not disputed. But is the action of the council board final and conclusive? Doubtless the Legislature might have made it so. It has not, however, by any express terms, seen fit so to declare. If it thus intended, that intention is to be ascertained from a construction of the act in question in connection with other acts. The statute (Gen. Stat. 1865, ch. 157) confers upon the Circuit Court jurisdiction, on proper complaint, to try and give judgment of ouster in cases where "any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise" whatever. The language of the enactment is broad and comprehensive. In its terms it embraces the case at bar. Does the charter of the city of St. Joseph exempt the respondent from the operation of the comprehensive words of this statute? Not by its express terms, certainly; nor yet by the necessary force of the language employed. There is no necessary antagonism between the two acts. The

State of Missouri ex rel. Turner v. Fitzgerald.

council judges of the election and qualification of its members in the first instance. It may organize and proceed to the transaction of business, and its acts will be legal and obligatory so far as the legality of the composition of the board is involved. But that does not exclude the idea of an investigation by the common-law courts of the right of any particular member to the office which the council board may have adjudged him qualified to fill. There is nothing in the nature of the office of councilman furnishing an argument in support of the proposition that the officer is shielded from any inquiry into his right to the office by the courts of law. This fact, in connection with the silence of the statute so far as express words go, general or specific, granting such exemption, is entitled to consideration. If, on a comparison of the enactment in question, and a consideration of the nature of the office, the jurisdiction of the court should still be deemed not free from doubt, that doubt should be resolved in support of the jurisdiction, in accordance with the maxim that remedies should be amplified in the advancement of substantial justice. (Broom's Legal Maxims, 62.)

The question under consideration depends for its solution upon the particular provisions of our own statute law and the construction to be given to these provisions. The authorities cited from other States, therefore, are in no way conclusive. That from Kentucky (1 Metc. 538) is an adjudication upon a statute of that State quite different from ours. It appears that in Kentucky a board is provided by law for the express purpose of adjudicating contested election cases, and that its decisions are "made final and conclusive by the statute," and that the statute was an enactment for the express purpose of withdrawing that whole class of cases from the jurisdiction of the "ordinary tribunals of justice."

In *Ewing v. Filley* (43 Penn. St. 386) the decision was upon the particular provisions of the statute of that State. The case was originally tried in the Quarter Sessions, and was taken thence to the Supreme Court by a writ of *certiorari*. The question of jurisdiction did not arise. *Lamb v. Lynd* (44 Penn. St. 336) was a *mandamus* proceeding against the "Select Council" of Philadelphia. The points decided are inapplicable to the present

litigation. The reasoning of the court in *ex parte* Heath, 3 Hill. 51, is much more to the purpose. Cowan, J., referring to the statute of New York, says: "Admitting the clause, however, to mean that each board shall be judges whether its members have been duly elected, it would still be difficult to show that the enactment amounts to anything more than the bestowment of a power concurrent with our own. * * * The word 'solely' might, by a liberal construction, imply an intent to take away the power. So might a statute, declaring the decision of an inferior court conclusive or final, be construed to take from this court the power to review the decision by *certiorari*. But it has often been held that those or the like words shall not be construed to divest the superior court of its supervisory power; and that, to give a statute such an effect, the Legislature must say in so many words that they intend to take the power away." An application of this rule of construction to section 6, article 2, of the city charter of St. Joseph is fatal to the demurrer.

Upon the whole, I am of opinion that the judgment should be reversed and the cause remanded. The other judges concur.

WILLIAM H. TURNER and WIFE, Appellants, v. ANDREW L. KERR and JAMES C. OGDEN, Respondents.

1. *Conveyance—Mortgage—Conditional sale—Difference between—Absolute sale with cotemporaneous stipulation.*—A conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the deed, or however absolute it may appear on its face; and where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of the mortgage. But it is not true that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein gives a cotemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, the transaction would be a conditional sale notwithstanding.
2. *Conveyance—Mortgage—Conditional sale—What constitutes difference between.*—In determining whether a transaction is a mortgage or a conditional sale, the understanding and purposes of the parties are to be considered.

Turner et al. v. Kerr et al.

If they intended an extinguishment of the debt, and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms—as a payment of an amount equal to the canceled debt and interest—such a transaction is a conditional sale, and not a mortgage. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of debt and interest, is a circumstance of no controlling importance.

Appeal from Fifth District Court.

Hall & Oliver, and Bassett & Van Waters, for appellants.

I. The conveyance and agreement admitted in the pleadings constitute a mortgage. (1 Washb. on Real Prop. 502.)

II. It is not necessary to insert the terms upon which the conveyance may be defeated in the deed by which it is made. It is sufficient if it be done in a separate instrument. (1 Washb. on Real Prop. 503; 3 Blackf. 51; 1 Hill. on Mort. 23, § 36.)

III. The deed in this case is absolute in its terms. But the agreement executed at the same time, and which is therefore to be considered a part of the same transaction, qualifies the terms and introduces conditions.

IV. A written agreement to reconvey upon the repayment of the consideration named in a deed, is a mortgage. (1 Hill. on Mort. 38, § 7; *id.* 105, § 9; 1 Washb. on Real Prop. 504; 3 Watts, 196; 6 Watts, 406, 409; 1 Metc. 199; 1 Allen, 108; 7 Wend. 249; 19 Wend. 520; 1 Sandf. Ch. 57; 12 How., U. S., 152; 1 Washb. on Real Prop. 516; 1 Hill. on Mort. 39, 40; 2 Blackf. 51; 17 Ohio, 356; 20 Ohio, 666; 4 Pick. 352; 1 Metc. 117; 1 Hill. on Mort. 115, § 14.) And the agreement to recovery may be made to a third person. (1 Hill. on Mort. 25; 2 Sumn. 540.)

V. Where there is a doubt whether the transaction be a mortgage or not, the court resolves the doubt in favor of the mortgagor. (1 Washb. on Real Prop. 516; 7 Mo. 327; 16 Mo. 145.)

VI. The transaction in proof created at least a trust in Kerr, and an equity in Turner, which chancery will enforce. (3 Hill. 95.)

VII. "Where the sale was for full value, but with an agree-

Turner et al. v. Kerr et al.

ment on the part of the grantor that if he could, within a certain time, sell for more than the purchase money, with interest, the surplus should be paid over to the grantor, the transaction was held a mortgage." (1 Washb. on Real Prop. 516; 1 Hill. on Mort. 40; Palmer v. Gurnsey, 7 Wend. 249.)

Vories & Vories, for respondents.

I. The transaction had no ingredient of a mortgage. No instrument is construed to be a mortgage where the relation of debtor and creditor does not exist. (1 Hill. on Mort., 3d ed., 95-107, notes and authorities there cited; 4 Kent, 144, 145; *Slowey v. McMurray*, 27 Mo. 113; *Holmes v. Grant et al.*, 8 Paige, 243; *Conway v. Alexander*, 7 Cranch, 238; *Brewster v. Baker*, 20 Barb., S. C., 364; *Lee v. Kilburn*, 3 Gray, Mass., 594; *Baker v. Thrasher*, 4 Den. 493; *Flagg v. Mann*, 14 Pick. 467; 2 Sumn. 534.)

II. The debt of respondent Kerr against Turner was extinguished by the sale of lots, and the note given up to Turner in accordance with said written agreement.

III. The agreement in suit was in the nature of a conditional sale, and the party seeking relief under it must show a strict compliance on his part. (27 Mo. 113.)

CURRIER, Judge, delivered the opinion of the court.

"A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: that the former is a "security for a debt," while the latter is a purchase accompanied by an agreement to re-sell on particular terms. Whether the instrument forming the foundation of this suit, in combination with the conveyance therein referred to, construed in the light of surrounding facts and circumstances, constitutes a mortgage or conditional sale, is the prominent question in the case at bar. It has been elaborately and ably discussed by counsel, and is perhaps the only question requiring the particular attention of the court. In considering the subject, it is at once to be admitted that a conveyance to secure a subsisting debt

Turner et al. v. Kerr et al.

is a mortgage, whatever may be the form of the deed, or however absolute it may appear upon its face. It is also true that, where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of a mortgage.

But it is not true, as a result of the adjudged cases, that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein (the creditor) gives a cotemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to his debt and the interest thereon.

In passing on transactions of this class, the understanding and purposes of the parties thereto are to be considered and respected as in other cases. If they intended an extinguishment of the debt, and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms—as a payment of an amount equal to the canceled debt and interest—the objects of the arrangement are not to be defeated by turning the transaction into a mortgage, when the parties intended no such result. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of the debt and interest, is a circumstance of no controlling importance. It settles nothing. It may often happen that a creditor would consent to take an absolute title stipulating for a reconveyance, when he would reject a mortgage because of the delay and expense to which he might be subjected upon a foreclosure.¹¹ Such arrangements operate beneficially to the debtor, securing to him additional time and renewed opportunities to extricate himself from embarrassment. Where the parties intend a conditional sale, and not a mortgage, and make their contracts in accordance with their intentions, it is not the province of the courts to circumvent and frustrate their intentions. It is nevertheless true that neither the intention of the parties nor their express contracts can change the essential nature of things. A conveyance to secure a debt is a mortgage, and the stipulations of the parties can not make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties

so intend, so that a plea of payment would bar an action thereon, a subsequent or cotemporaneous stipulation in the interest of the debtor, securing to him an opportunity to re-acquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale.

The whole subject of conditional sales, as distinguished from mortgages, is fully and ably discussed in 1 Hill. on Mort. 95, ch. 5. The rule is there laid down that a "sale with an agreement to re-purchase, though narrowly watched, is construed like any independent agreement between strangers, and the right of redemption restricted to the appointed time. So, also, the title passes to the vendee, and he has the intermediate rents and profits." Numerous authorities are cited in support of this doctrine. In *Conway v. Alexander* (7 Cranch, 237), Chief Justice Marshall says: "To deny the power of two individuals capable of acting for themselves to make a contract for the purchase and sale of lands defeasible by the payment of money at a further day—or, in other words, to make a sale with a reservation to the vendor of a right to re-purchase the same lands at a fixed price and at a specified time—would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as infants."

The principle was fully recognized in *Slowey v. McMurray* (27 Mo. 113), that where there is no continuing indebtedness, "and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitling himself to a reconveyance, the sale is conditional, and not a mortgage." This is stated substantially in the language of Chancellor Kent. And see further on this subject, 4 Kent, 143-4; *Holmes v. Grant*, 8 Paige Ch. 243; *Brewster v. Baker*, 20 Barb. 364; *Lee v. Kilburn*, 3 Gray, 594; *Flagg v. Mann*, 14 Pick. 467; 2 Sumn. 534; *Baker v. Thrasher*, 4 Den. 493. "An application of these principles to the contract sued on will make it evident that the arrangement therein developed constituted, at most, a conditional sale, and was in no aspect of the case a mortgage."

The contract states that the plaintiffs, on the day of the date thereof (January 4, 1864), sold certain real estate in the city of

Turner et al. v. Kerr et al.

St. Joseph to the defendant Kerr, for the consideration of \$5,387.80 — that being the amount of the then indebtedness of Turner to Kerr; that Turner agreed to remove from the property all encumbrances; and that Kerr agreed that “if said property could be sold within six months from date for more than said amount of consideration, with ten per cent. interest, the said Kerr would pay over to said Turner the full amount of all moneys realized over and above said consideration and said interest; and that Mrs. Turner should have the use of the house, rent free, to the first of March, 1864, or the benefit of the same; said Kerr further binding himself to deliver up the note evidencing the \$5,387.80 indebtedness.”

This contract shows a sale to Kerr for \$5,387.80, in satisfaction of Turner's indebtedness to the former upon said note, and that the note was to be surrendered to Turner. “The surrender of the note, or agreement to do so, in consideration of the conveyance, shows clearly and satisfactorily that the parties intended to wipe out and extinguish the then existing indebtedness, so that it should no longer have any existence.” It is also equally evident that it was the purpose of the parties to have the title to the property so vested in Kerr that Turner's relation to it thereafter should be the same as though he had bargained for its re-acquisition, on like terms, from a stranger between whom and Turner the relation of debtor and creditor had never existed. There is nothing in the contract, or in its cotemporaneous surroundings, that suggests the idea that the parties themselves had the least suspicion that they were, by the deed and contract, bringing into existence a mere mortgage security. They were competent to contract; and there is nothing in the letter or policy of the law warranting a construction of their agreements at variance with their plain reading and the obvious intentions of the parties thereto.

The point is made, however, that Turner, by the contract itself, acknowledged a continuing indebtedness. That would be vitally important if the fact were as the argument supposes; but the opposite is the truth. The contract recites that whereas said Turner “was owing,” etc., and goes on to show by what arrange-

ment this past indebtedness had been settled and extinguished. The evidence preserved in the record exhibits nothing in modification of the essential character of the transaction, as it appears upon the face of the papers, as regards the question of a mortgage or conditional sale.

But it is insisted on the authority of *Cooper v. Whitney* (3 Hill. 95) that, although the transaction in proof may not be held a mortgage, it nevertheless created a trust in Kerr, and an equity in Turner, which chancery will enforce. The authority does not sustain the proposition. It is there held that where a deed of lands is executed, and a covenant made between the parties at the same time declaring that the grantee shall sell the lands to pay certain of the grantor's debts, and return to him the surplus, but containing no reservation of a right to redeem, the transaction will be regarded as constituting a conveyance in trust, and not a mortgage. There certainly can be no objection to that law, but it has no application to the facts of this suit. Kerr did not take the conveyance under a covenant to sell the land and apply the proceeds in the payment of certain of Turner's debts, paying over any surplus that might arise therefrom to the grantor.

But it is unnecessary to pursue the subject further. I have looked through the evidence, but am unable to discover from it that the supposed opportunity to sell to Rector, within the six months, at an advanced price, was lost through the absence of Kerr from St. Joseph. Rector was informed by Kerr's attorney that the requisite deed could be had if he desired to consummate the purchase. He abandoned the trade, however; whether because of the encumbrance on the property, which Turner was to remove, but had not, or for other reasons, does not appear.

My conclusion upon the whole case is that the ruling of the District Court reversing the judgment of the Court of Common Pleas ought to be affirmed. The other judges concur.

STATE OF MISSOURI *ex rel.* H. L. RICE *et al.*, Appellants, *v.*
JAMES L. POWELL, Respondent.

1. *Sheriff—Collector of taxes—Official bond, liability on.*—The doctrine that a sheriff is liable on his official bond for his wrongful acts under color of office has been long established in Missouri; and his liability extends to him as collector of taxes in those counties where it is made his duty to collect them.
2. *Revenue—Land, judgment on for taxes on personalty.*—There is no shadow of warrant for rendering judgment upon land for taxes due on personal property.
3. *Damages—Sheriff—Taxes, refusal to receive—Official bond, liability on—Measure of damages—Money paid voluntarily.*—A sheriff who refuses to receive the legal taxes assessed upon real estate, and returns the land delinquent because the owner failed to pay a tax assessed on his personal property, was altogether mistaken in his duty, and failed, according to the condition of his bond, "to faithfully perform all the duties of his office of collector according to law." But he would not be liable to the owner upon his bond for the taxes on the personalty, with interest and costs, which the latter paid under judgment of the County Court against his delinquent land, and might have avoided by appearing in the court prior to judgment, and attending to his interests. Such taxes must be held to have been paid voluntarily, and can not be recovered back in an action at law.
4. *Damages, recovery of—Diligence used in avoiding—Measure of damages.*—It is now well settled that one who is injured by another has no right to suffer damages to accumulate which it is in his power to prevent. He can not recover damages for injuries which by reasonable exertion he might avoid.

Appeal from Fifth District Court.

Strong & Chandler, for appellants.

I. If the collector so made his return (after the land tax was tendered to him) as to induce and cause the County Court to render judgment against the land for both land and personal tax, he violated the law, and is liable in this action.

II. The relators were bound to take notice of all that the collector or County Court might lawfully do, but they were not bound by any unlawful act of the collector or County Court in the premises.

III. The collection of taxes is against common right, and the

State of Missouri ex rel. Rice et al. v. Powell.

collector must strictly pursue the authority given him by law, or he is liable. (19 Mo. 369-71; 37 Mo. 280; 6 Mo. 64; 9 Mo. 868; 13 Mo. 437; 15 Wend. 579; 7 J. J. Marsh. 166.)

Asper & Pollard, for respondent.

I. The relators herein had their day in the County Court, and they are consequently precluded from bringing this suit. (Sess. Acts 1864, p. 85, § 2; *id.* 86, §§ 7, 8.)

II. The defendant had executed the order of the County Court in selling said lands, and is not liable on his bond, for he committed no laches as collector. (County of Lewis v. Tate, 10 Mo. 650; Walker v. City of St. Louis, 15 Mo. 563; Christy's Adm'r v. City of St. Louis, 20 Mo. 12, 13; Moss *et al.* v. State, 10 Mo. 338; Broom's Leg. Max. 97.)

III. It was legal for defendant to sell said real estate for the taxes of both personal and real property. No property is exempt from sale for taxes. (Sess. Acts 1864, p. 78, § 22.) There is no distinction in personal or real tax in delinquent list. (Sess. Acts 1864, p. 80, §§ 37-8.)

BLISS, Judge, delivered the opinion of the court.

This was a suit against Powell, as sheriff and tax collector of Daviess county, for refusing to receive the legal tax assessed upon certain real estate, returning the same as delinquent, and finally selling it. Rice and Caldwell purchased a farm of one Hays, after the assessment of the tax of 1865, and hence held the land charged with the tax. There was also upon the collector's books an assessment of a tax upon the personal property of said Hays. Rice and Caldwell in due season offered to pay, and tendered to the sheriff the tax upon the land; but he refused to receive it unless they would also pay the tax upon the personal property. This they did not do. The land was returned delinquent; judgment was rendered by the County Court for the amount of both taxes, interest, costs, etc.; the land was sold, and afterward redeemed by said Rice and Caldwell upon payment of the whole amount, with interest, costs, and penalty. They now

State of Missouri ex rel. Rice et al. v. Powell.

seek to recover back of the sheriff upon his official bond, as damages for its breach, the whole amount so paid. Defendant demurred, and judgment was rendered in his favor by the Circuit Court, which judgment was affirmed in the District Court.

The doctrine that the sheriff is liable upon his official bond for his wrongful acts under color of his office has been long established in Missouri, and this liability extends to him as collector of taxes in those counties where it is made his duty to collect them. (State, etc., v. Moore, 19 Mo. 369; State, etc., v. Shacklett, 37 Mo. 280.) The demurrer, therefore, upon the general ground of non-liability, is not well taken. But it is clear that he is not liable for executing the judgment of the County Court by selling the land or executing its order of sale. So far, he did only what he was commanded to do by his precept; and the court having given judgment against the land and ordered its sale, the matter being within its jurisdiction, and the plaintiffs having had their day in court, he is protected in its execution. The principle that thus protects him is too familiar to require elucidation.

He can not, however, make this plea in justification of his proceedings before the judgment. The tax list was placed in his hands for collection, containing an assessment against the real estate and an assessment of the personal property of one Hays. By the act of 1864, as well as by the General Statutes of 1865, the real and personal property must be listed and assessed separately. Section 31 of the act of 1864 is the same as section 41, chapter 12, Gen. Stat. 1865; and section 32 also expressly provides that "each tract of land and town lot shall be assessed, valued, and listed separately, and each kind of property shall be assessed separately from any other kind." A copy of this assessment was placed in the hands of the collector, containing the land and town lots of Hays, listed separately from each other and also separately from his personal property. The plaintiffs had purchased this real estate, and had a right to pay the taxes upon it, but were under no obligation whatever to pay upon the personal property. The action of the sheriff was sustained below partly on the ground that those taxes upon the personalty were

State of Missouri ex rel. Rice et al. v. Powell.

a lien upon the realty. But I have searched in vain for any authority for this position. The State may be, and often is, cheated out of taxes due upon personal property by those who sell their land and remove their personal effects beyond the reach of the collector. But the statute fails to make any provision for collecting it out of the realty. The collector had, and still has, power to collect all taxes by seizing the goods of those who owe them. But the delinquent list returned to the County Court for judgment and sale embraces and embraced only "the delinquent lands and town lots" upon which the taxes remain due and unpaid, "with the amount of the tax, etc., due thereon" after advertising. The law provides that "the taxes on the lands and town lots returned delinquent may be paid at any time prior to the rendition of judgment," etc.; and in rendering judgment, the statutory form recited and recites that no one has appeared to show cause why judgment should not be rendered against the land for the taxes, etc., due thereon, and enters judgment, with an order of sale for the taxes "due severally" upon the lots of land. There is no shadow of a warrant for rendering judgment upon the land for taxes due upon personal property. Yet, in the case before us, not only did the sheriff demand of the plaintiffs the taxes upon Hays' personal property, and refuse to receive the taxes upon the land unless they were also paid, but the County Court actually rendered judgment against the land for both classes of taxes. It is perfectly clear that the sheriff was altogether mistaken in his duty, and failed, according to the condition of his bond, to "faithfully perform all the duties of his office of collector according to law," by refusing to receive the taxes due upon the land, and by afterward returning the land delinquent. But it is not so easy to determine the measure of damages to which the plaintiffs are entitled. It was in their power, with very little trouble and expense, to appear before the County Court and object to a judgment against the land; and we are bound to suppose that if they had so appeared no judgment would have been rendered, or, at least, none except for the taxes due upon the land, with interest and costs. This judgment they could have paid, when the only damage they would

Richardson v. Vrooman et al.

have suffered would have been their reasonable expenses for attending the court, and the interest and costs embraced in the judgment over and above the amount originally due.

It is now well settled that one who is injured by another has no right to lie by and suffer damages to accumulate which it is in his power to prevent. He must use proper diligence to prevent or arrest the effect of the injury. Whatever he voluntarily suffers, which by reasonable exertion he may avoid, he must charge to his own account.

The petition charges that much the largest portion of the taxes due from Hays were charged upon his personal property; that the plaintiffs were obliged to pay those taxes, with interest, costs, and penalty upon the whole, in order to redeem the land. But they might, as we have seen, have avoided the necessity by proper diligence in attending to their interests. By the course they pursued they should be classed with those who voluntarily pay taxes which they might have resisted; and it has been long since decided in Missouri that such taxes can not be recovered back. (County of Lewis v. Tate, 10 Mo. 650; Walker v. City of St. Louis, 15 Mo. 653; Christy's Adm'r v. City of St. Louis, 20 Mo. 143.)

The court below erred in sustaining the demurrer, and their judgment should be reversed and the cause remanded to the Circuit Court of Daviess county for trial or judgment upon the demurrer for damages sustained as above. The other judges concur.

MARTHA RICHARDSON, Petitioner, v. HIRAM P. VROOMAN and
JAMES L. BERRY, Respondents.

1. *Act reorganizing Macon Court of Common Pleas—Misdemeanor—Felony—Jurisdiction—Construction of statute.*—By the third section of the act organizing the Macon Court of Common Pleas (Sess. Acts 1868, p. 275), that court is prohibited from usurping the powers of the Circuit Court, which has exclusive and original jurisdiction over felonies; and when, upon examination, it is disclosed that the offense is a felony instead of a misdemeanor, it is the duty of the Common Pleas Court to certify that fact to the Circuit Court. But it has jurisdiction to proceed by complaint or information in cases of misdemeanor.

Richardson v. Vrooman et al.

Petition for writ of prohibition.

B. G. Barrows, for petitioner.

Gilstrap, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This is an application on the part of the plaintiff for a writ of prohibition to restrain the defendant Vrooman, who is judge of the Court of Common Pleas of Macon county, from further taking cognizance of a proceeding now pending in that court against the plaintiff, and also to prohibit the defendant Berry, county attorney, from further prosecuting the same.

The county attorney filed an information in the Court of Common Pleas charging the plaintiff with the commission of a misdemeanor, and upon that complaint she was arrested; and the only question is whether said court has jurisdiction to hear and determine cases of misdemeanor brought before it on complaint or information.

We will not again re-argue the question whether the Legislature has the power to provide that all misdemeanors shall be triable on information, and whether it can not organize a special and inferior tribunal to assume jurisdiction over such cases. That subject was examined in *The State v. Ebert* (40 Mo. 186), and the conclusions there arrived at will not be disturbed. If the Legislature, in organizing the Common Pleas Court of Macon county, granted the power of hearing and determining cases of misdemeanors commenced by information or complaint, there is no reason for disputing its jurisdiction.

The third section of the act providing for its organization says: "The Court of Common Pleas shall have original jurisdiction, within said county, of all misdemeanors which shall be punishable therein by complaint or information, and not by indictment, except those over which justices of the peace have exclusive jurisdiction. All prosecutions therefor shall be commenced in said court by filing with the clerk a written complaint or information, verified by affidavit, against the defendant or defendants, against

Richardson v. Vrooman et al.

whom, if not recognized to answer, the proper process shall issue for the body of the defendants ; and if the evidence discloses, in the progress of any trial for misdemeanor and felony over which the court has no jurisdiction, further proceedings shall be stayed, and the facts certified to the Circuit Court, with a copy of the record in the case, and the defendant and prosecuting witnesses let to bail for their appearance in the Circuit Court having jurisdiction of the offense, or committed, as the case may require, by the judge of the Court of Common Pleas."

The wording of the section is in some respects involved and the meaning rendered obscure by errors of punctuation in the original act ; but neither bad punctuation nor false grammatical construction will render a statute inoperative if its meaning is plain and susceptible of easy interpretation. The act was intended to give and does give the Court of Common Pleas original jurisdiction over all misdemeanors not exclusively cognizable before justices of the peace. But it is prohibited from usurping the powers of the Circuit Court, which has exclusive and original jurisdiction over felonies ; and when, upon an examination, it is disclosed that the offense is a felony instead of a misdemeanor, it is the duty of the Common Pleas Court to certify that fact to the Circuit Court. To deny the jurisdiction of the court to proceed by complaint or information in case of misdemeanor, would be to misinterpret language and defeat the plain and manifest intention of the enactment.

One or two other points have been presented, but we have been unable to find anything in them calling for special comment.

Our conclusion is that the court rightfully exercised jurisdiction over the matter complained of, and that the writ should be denied. The other judges concur.

Ruby v. Hannibal and St. Joseph R.R. Co.

WM. C. RUBY, Respondent, *v.* HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. Parker v. Hannibal and St. Joseph Railroad Company, *ante*, p. 415, affirmed.

Appeal from Fifth District Court.

Carr, and *Hall & Oliver*, for appellant.

Prewitt, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This case was argued in conjunction with the case of Parker v. Hannibal and St. Joseph Railroad Company, and the facts are precisely similar. For the reasons given in that case, the judgment will be reversed and the cause remanded, at appellant's costs. The other judges concur.

[END OF AUGUST TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
OCTOBER TERM, 1869, AT ST. LOUIS.

WM. GRUMLEY, Appellant, *v.* WM. G. WEBB, Respondent.

1. *Equity—Agent—Purchase of property of principal by, forbidden.*—An agent can not be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation.
2. *Equity—Agent, while in fiduciary capacity, can not interfere with title to the trust property.*—An agent who, for a certain remuneration, undertook to collect the rents and exercise control over the property of his principal while the latter was absent and relied entirely on his discretion, judgment and integrity, had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. By purchasing the property under such circumstances, he made himself liable as a trustee in relation thereto, for the benefit of his principal.
3. *Equity—Sale—Purchaser—False representations by—Constructive trusts.*—Where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain—as, by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that

Grumley v. Webb.

- he intended to reconvey the property, and thereby obtained it at a sacrifice—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (*McNew v. Booth*, 42 Mo. 189.)
4. *Equity—Leasehold estate—Trustee—Renewal of lease in name of—Profits, to whom accounted for.*—Where a trustee in charge of a leasehold estate obtained a renewal of the lease of his *cestui que trust* in his own name, before the lease had expired, and the possession and title which he had got by reason of his being agent or trustee superinduced the execution of the lease to him, he will be obliged to assign it to the *cestui que trust*, and account for the profits.
 5. *Equity—Lease—Renewal of by trustee in his own name—New lease held in trust for person entitled to original lease.*—A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon a refusal of the lessor to grant a new lease to the *cestui que trust*, will be held in trust for the person entitled to the old lease, on the ground of public policy, in order to prevent persons in such situations from acting so as to take a benefit for themselves.
 6. *Evidence—Receipt—General and particular terms, how construed.*—A receipt given in full satisfaction of a certain judgment therein specified, and also of "all claims and demands," will not avail against another suit pending between the same parties, and not shown to have been intended by them to be included in the receipt. Language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.

Appeal from St. Louis Circuit Court.

Nathaniel Myers, and Oliver, with whom were Cline, Jamison & Day, for appellant.

I. The equitable title to the lease is in Grumley. 1. Webb's permitting Grumley's improvements to remain on the land for his own benefit, was a fraud upon Grumley's rights. His procuring the sheriff's deed of January 31, 1857, was a gross fraud in law and in fact upon his principal, Grumley. His retaining possession under that deed, excluding Grumley, refusing to account for rents, and forcing Grumley to sue him, were also gross frauds on Grumley's rights. And it was because Webb suffered the buildings to remain, and because he had a seeming title, and because he had possession, that he was enabled to get the lease now in controversy. 2. When a new lease is granted, the old one is considered to be still in being. The new lease is considered a graft

Grumley v. Webb.

upon the old. Whoever is entitled to the profits of the old lease is entitled also to those of the new. (Rawe v. Chichester, 1 Ambler, 719; Randall v. Russell, 3 Merivale, 195; Taster v. Marriott, 1 Ambler, 668; Eyre v. Godolphin, 1 Ball & B. 299; Holridge v. Gillespie, 2 Johns. Ch. 29; Rakestraw v. Brewer, 2 Pierre W. 512.) 3. The agency of the defendant estopped him, under any circumstances, from getting a new lease for himself. (Zilkin v. Carhart, 3 Bradf., N. Y., 376; Phyfe v. Wardell, 5 Paige's Ch. 279; Tanner v. Elworthy, 4 Beav. 491.) The ground of decreeing renewals by trustees to inure to the benefit of the infant is public policy, to prevent persons in such situations from acting so as to take a benefit to themselves. (Griffin v. Griffin, 1 Sch. & Lefr. 352; Owen v. Williams, 1 Ambler, 734; Bennett v. Vansyckel, 4 Duer, 462; Davoue v. Fanning, 2 Johns. Ch. 251; Pickering v. Vowles, 1 Brown's Ch. 182; Fitzroy v. Howard, 3 Russ. Ch. 233; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Van Horn v. Fonda, 5 Johns. Ch. 409; Huson v. Wallace, 1 Richardson's Eq. 2-7; Whalley v. Whalley, 1 Vern. 484; Mulvaney v. Dillon, 1 Ball & B. 417; 2 Fonblanque's Eq. 189.) 4. It matters not that there was no covenant of renewal contained in the old lease. The right to the new lease is not based on covenant. It results from the relation of the parties—from the "beneficial interest connected with a tenancy as an inducement toward a renewal." (Zilkin v. Carhart, *supra*.) "Though the lessors are not bound to renew, yet, when done, it is a continuation of the old lease." (Rawe v. Chichester, 1 Ambler, 719; Owen v. Williams, *supra*; Pickering v. Vowles, 1 Brown's Ch. 182; Griffin v. Griffin, *supra*; Eyre v. Godolphin, 1 Ball & B. 299; Davoue v. Fanning, *supra*; Bennett v. Vansyckel, *supra*.) 5. The policy of the law prohibits a trustee from getting a new lease to himself, although the lessor refuses to renew to the *cestui que trust*. (Bennett v. Vansyckel, *supra*; Keech v. Sandford, 3 Eq. Cas. Abr. 741; Davoue v. Fanning, *supra*; Lead. Cas. in Eq., Hare & Wall. Notes, pp. 84, 97.)

II. The plaintiff Grumley has never in any way parted with his equitable interest in this new lease. 1. Webb has no writing sufficient, under the statute of frauds, to show such transfer.

Grumley v. Webb.

The only writing the defendant has is a receipt for the judgment alone. The receipt itself includes nothing else. The sweeping clause "in full of all claims and demands" is to be restrained and limited by the previous special recital of the "judgment." A general release is to be taken most strongly against the releasor; but where there is a special recital, and then general words follow, the general words are to be restrained and qualified by the special recital. (Bac. Abr. 633; Sto. on Agency, §§ 21, 62, 65, 66, 74; Sto. on Cont. § 642 *et seq.*; Chit. on Cont. 84; 2 Pars. on Cont. 220; Add. on Cont. 845; Fox on Cont. 155; Powell on Cont. 235-6; Swift's Dig. 300; Jackson v. Stackhouse, 1 Cow. 122; Lyman v. Clark *et al.*, 9 Mass. 237; McIntire v. Williamson, 1 Edw. Ch. 34; Payne v. Allen, Sprague, 304; Averill v. Lyman, 18 Pick. 346; Rich v. Lord, 18 Pick. 346; Van Hagen v. Van Rensselaer, 18 Johns. 420; Elmendorf v. Lansing, 5 Cow. 470; Payler v. Homersham, 4 Maule & Selw. 425; Ramsden v. Hylton, 2 Ves. Sr. 309; Cole v. Gibson, 1 Ves. Sr. 505; Thorpe v. Thorpe, 1 Raymond, 235; Cole v. Knight, 3 Mod. 277; Butcher v. Butcher, 4 Bos. & Pul. 113; Simons v. Johnson, 3 Barn. & Ald. 180; Bruen v. Marquand, 17 Johns. 58; Littlefield v. Winslow, 19 Maine, 397; Rossiter v. Rossiter, 8 Wend. 494; Hays v. Goldsmidt, cited in 1 Taunt. 349; Hoes v. Van Hoesen, 1 Barb. Ch. 398; Taylor v. Robinson, 14 Cal. 399; Washburn v. Alden, 5 Cal. 463.) 2. The defense is seeking to extend the receipt by parol. Even if they had a right to do this, it would yet be incumbent on them to show, by direct and positive testimony, that the matter in regard to which they wish to introduce parol evidence was expressly mentioned, and that, too, in the way of bargain and sale; and it being an interest in land, a transfer of which they are seeking to prove by parol, they must prove it (if at all) by indubitable proof of the contract in all its parts.

Krum, Decker & Krum, for respondent.

I. The plaintiff, by his petition and proofs, seeks to raise a constructive trust and fasten it on the conscience of the defendant, and convert him into a trustee for the plaintiff *quoad* the

Grumley v. Webb.

property in question. To raise a constructive trust, the burden rests on the plaintiff to show that the acquisition, by defendant, of the lease of John O'Fallon for a term of ten years from January 1, 1864, was effected with fraud. He has failed to show this.

II. In order to raise a constructive trust, it is essential that three things be made to appear, viz: 1. That the plaintiff had a right to, or property or interest in, the subject matter of the trust. 2. That the defendant, at the time of the transaction, stood in a fiduciary relation to the plaintiff or the property. 3. That the defendant, in his fiduciary capacity, had control of the subject matter, and by reason of such control obtained the property to his own use. The evidence establishes neither of these propositions.

III. The settlement made March 7, 1865, set up in the answer, is a full and complete defense to this action. The plaintiff, by his receipt, acknowledged the sum paid (\$6,500) to be in full satisfaction of all claims and demands which he then had or held against the defendant. The language used in the receipt is the most comprehensive known in the law. " 'Demand' is a word of most extensive import, and a release of all demands discharges all manner of actions existing at the time." (4 Den. 166.) That settlement included all damages the plaintiff had sustained by reason of the alleged wrongs of the defendant in respect to the leasehold property, and the receipt is a good bar to any subsequent action for damages, and also a bar to a suit in equity for the title. (Hughes v. Moore, 7 Cranch, 178; Swift's Dig. 300.)

WAGNER, Judge, delivered the opinion of the court.

This was a bill in equity to have a renewed lease, procured by the defendant while agent of the plaintiff, declared a trust for the plaintiff, and for an account. The record shows that the plaintiff leased from John O'Fallon an unimproved lot of ground in 1844, and in 1855 completed the building of fifteen houses on it. The lease was to expire January 1, 1864, with a privilege in plaintiff of removing his improvements at any time before its expiration. Just before completing the building of the houses, the plaintiff, by

Grumley v. Webb.

a power of attorney, made defendant, who was in the real estate business, his agent to collect the rents and manage his property, and then departed for Europe. While plaintiff was absent, the defendant, his agent, bought in three judgments for himself, which were outstanding against the plaintiff. Upon these judgments he caused executions to be issued, had the fifteen houses levied on, and sold at sheriff's sale, and bought them in himself, taking a deed therefor, while plaintiff was absent in Europe. The sale was made in January, 1857, and the evidence is uncontradicted that bidders were kept away and competition warded off by defendant's declaring that he was purchasing the buildings for his principal, the plaintiff. The buildings were purchased at sheriff's sale, and, as the evidence shows, for less than a tenth of their real value. The defendant stated on different occasions that he purchased the buildings for the plaintiff, but it seems that he really bought them for himself, with the intention of keeping them; and when plaintiff, on hearing of the sale, returned home, he refused to give him any account of the rents of the houses except up to the time of the sheriff's sale to him. Plaintiff then sued defendant, as his agent, for an account, and in May, 1864, recovered a judgment for \$11,522.54, for rents collected and appropriated by defendant up to January 1, 1864, the date that the lease expired.

In the month of November, 1863, and before the expiration of the lease, both parties (the plaintiff and defendant) applied to the lessor for a renewal of the lease. The lessor, O'Fallon, refused to continue the lease to the plaintiff, but granted a lease of the premises for ten years from January 1, 1864, to the defendant; and he has ever since enjoyed the rents and profits of the lot, together with the buildings thereon erected by the plaintiff.

O'Fallon is dead, but the testimony of Keber, his chief clerk, a disinterested witness, states that he knew of no objection to the plaintiff, but that O'Fallon made it a rule to grant a new lease to the one already in possession. The defendant was in possession, to the exclusion of his principal, the plaintiff; he exhibited his deed to show title, and it is charged that he made use of his wrongful possession and pretended title to acquire his lease.

Grumley v. Webb.

After the procurement of this lease by the defendant, and at the September term, 1864, of the St. Louis Circuit Court, the plaintiff brought suit against the defendant for \$7,000, in which he set up that under the first lease he had a right to remove the improvements at any time before the 1st of January, 1864, and that the defendant refused to let him remove them after that date, thereby damaging him in the above amount, for which he asks judgment. A demurrer was filed and sustained to this last petition. While this last suit was pending, and the prior judgment remained unsatisfied, negotiations were entered into for a compromise. It appears that an appeal was taken from the judgment as rendered, and it was agreed by the attorneys on both sides that there was a mistake in the calculation as to amount, and that it was rendered for too much. They finally agreed on six thousand five hundred dollars, and the plaintiff executed to the defendant the following receipt:

“Received from William G. Webb six thousand five hundred dollars, which is in full satisfaction of a judgment recovered by me against said Webb and David S. Bigham, in the St. Louis Circuit Court; and said sum is in full satisfaction of all claims and demands I have or hold against said Bigham and Webb, or either of them, up to this date.

“(Signed)

WILLIAM GRUMLEY.

“St. Louis, *March 7, 1865.*”

It should be stated that Bigham was in partnership with defendant Webb in the real estate business when the plaintiff intrusted his business to their care, but they dissolved partnership before plaintiff's return from Europe, and the whole matter passed into the hands of the defendant, who alone was sued in this suit.

Upon the facts as above set forth, the case was heard in the court below, and the bill dismissed for want of equity.

It is contended by the counsel for the plaintiff that the defendant, at the time he acquired the lease, stood in a fiduciary capacity, and was disabled from taking and holding the same on his own account, and that it inured in equity to plaintiff's benefit.

Grumley v. Webb.

Defendant's counsel insists that the lease in controversy did not inure to the benefit of the plaintiff upon its procurement, and that, if it did, the receipt shows a settlement of all matters in difference between the parties, and includes this as well as all other claims. Nothing is better settled than that an agent or a trustee, or any person acting in a fiduciary capacity, can not speculate for his private gain with the subject matter committed to his care, to the prejudice of his principal. He can not be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation. (Jamison v. Glascock, 29 Mo. 191; Boardman v. Florez, 37 Mo. 559; Jacques v. Edgell, 40 Mo. 77; Thornton v. Irwin, 43 Mo. 153; State, etc., v. McKay, 43 Mo. 594.)

Lord St. Leonards, in his work on vendors and purchasers, lays down the rule with great clearness. He says: "It may be laid down as a general proposition that trustees, who have accepted the trust (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will be shortly mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" (Sugd. on Vend. and Pur., 13th ed., 566.)

In New York it has been decided that the clerk of a broker

Grumley v. Webb.

employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. (Gardner v. Ogden, 22 N. Y. 325.)

That the defendant in this case occupied a relation of trust and confidence toward the plaintiff is undisputed. For a certain remuneration he undertook to collect the rent and exercise control over the property. His principal was absent, and relied entirely on his discretion, judgment, and integrity. Under such circumstances he had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. But this is not all. It was expressly agreed that the rents, as they were collected, after paying taxes and ground-rent, should be applied to the payment of the judgments. But, instead of pursuing this course, the defendant, as agent, purchases up the judgments, has them assigned to him, orders out execution, and buys the property in his own name. This, too, while the plaintiff was in Europe, relying on the defendant's honesty and diligence to protect his rights. That the deed was taken in the defendant's name, and that he afterward refused to account for rents beyond the time that he acquired the deed, shows that the purchase was made *ex maleficio*. Had there been no agency, under the facts in this case, the defendant would still have been placed in the position of a trustee. He obtained the property at a sacrifice, by representing that he was buying for his principal; and no principle is clearer than that where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain—as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (McNew v. Booth, 42 Mo. 189, and cases referred to.)

We think, then, the proposition may be fairly stated that at the time the purchase was made, at sheriff's sale, the defendant was disabled from acting on his own account, and that for whatever he did he will be held liable as a trustee.

When he acquired the lease from O'Fallon he was dealing as a trustee; and he obtained a renewal of the lease of his *cestui que trust* in his own name before the lease had expired; and the evidence leaves no room to doubt that the possession and title which he had got by reason of his being agent or trustee were the agencies which superinduced the execution of the lease to him.

A uniform series of decisions, both English and American, have adjudged that under such circumstances the trustee can not take the lease to himself; and if he does, he will be obliged to assign it to the *cestui que trust*, and account for the profits. The leading case on this question is *Keech v. Sandford* (Selw. Cas. in Ch. 61), which was tried in 1726, before Lord Chancellor King. In that case, a person being possessed of a lease of the profits of a market, devised his estate to a trustee in trust for the infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant, which he refused, in regard that, it being only of the profits of the market, there could be no distress, and must rest singly in covenant, which the infant could not do.

There was clear proof of the refusal to renew for the benefit of the infant, and the trustee then got a lease made to himself. Bill was brought by the infant to have the lease assigned to him, and for an account of the profits, on the principle that wherever a lease is renewed by a trustee it shall be for the benefit of the *cestui que use*. This principle was not denied in the argument for the trustee, but it was endeavored to be avoided on the ground of the express refusal of the lessor to renew to the infant. But the Lord Chancellor said: "I must consider this as a trust for the infant, for I very well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is fraud in this case, yet he (the trustee) should rather have let it run out than to have had the lease to himself. This may seem hard, that

Grumley v. Webb.

the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; 'for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.'"

And a decree was accordingly entered that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenant comprised in the lease, and that an account should be taken of the profits made after the renewal.

Keech v. Sandford, sometimes called the Rumford Market case, is cited by the learned authors of the *Leading Cases in Equity* (see *White & T. Lead. Cas. in Eq.*, 36) as the leading authority on the doctrine of constructive trusts arising upon the renewal of a lease by a trustee or executor in his own name and for his own benefit.

The rule inflexibly laid down by Lord King has been invariably followed, namely: that a lease renewed by a trustee or executor, in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease. For this position the authors cite the following cases: *Fitzgibbon v. Scanlan*, 1 Dow, 261, 269; *Rawe v. Chichester*, 1 Amb. 715; 1 Bro. Ch. C. 198; 2 Dick, 480; *Pickering v. Vowles*, 1 Bro. Ch. C. 198; *Pierson v. Shore*, 1 Atk. 480; *Nesbitt v. Tredenick*, 1 Ball & B. 46; *Abney v. Miller*, 2 Atk. 597; *Edwards v. Lewis*, 3 Atk. 538; *Killick v. Flexney*, 4 Bro. Ch. C. 161; *Moody v. Mathews*, 7 Ves. 174; *James v. Dean*, 11 Ves. 383; *Parker v. Brooke*, 9 Ves. 583; *Lovatt v. Knipe*, 12 Ir. Eq. Rep. 124; *Walley v. Walley*, 1 Vern. 484; *Holt v. Holt*, 1 C. C. 190.

The reason assigned for decreeing renewals by trustees and executors, to inure to the benefit of the *cestui que trust*, is public policy, to prevent persons in such situations from acting so as to take a benefit for themselves. (*Griffin v. Griffin*, 1 Sch. & L. 354, per Lord Redesdale; *Blewett v. Millet*, 7 Bro. P. C. 367, Toml. ed.)

The same doctrine applies to partnerships, where one partner obtains a renewal of a partnership lease for his own benefit, and

Grumley v. Webb.

to a person having a limited interest in a renewable lease, as a tenant for life. If he renews it in his own name, he will be held trustee for those entitled in remainder in the old lease.

In American jurisprudence the principle is equally as well settled as in England. In an early day, the ablest of all American chancellors (Kent) gave the subject a thorough and profound discussion, and fixed the rule on a strong basis. It would too much extend the length of this opinion to attempt a review of the American authorities, but they will be found collated by the American editors, Hare & Wallace, in a note to *Keech v. Sandford*, above referred to.

In the case of *Zilkin v. Carhart* (3 Bradf. 376), the intestate having owned a lease for years, without covenant of renewal, but with a stipulation that the right of the lessee to take away the building on the premises should not be impaired, and the administratrix having taken a renewal in her own name, it was held that the new lease inured to the benefit of the estate, and that the administratrix was bound to account to the next of kin for its value and for the rents which had accrued, less the current charges, repairs, and ground-rent.

The surrogate, in his opinion, said there was always a beneficial interest connected with a tenancy as an inducement toward a renewal, which in equity was regarded as valuable; and a trustee could not avail himself of his position, and use the good-will for a renewal in his own right, in exclusion of the parties for whom he was trustee. (See, also, *Thomas v. Zumbalen*, 43 Mo. 471.)

In general, however, where the trustee buys an estate, or renews a lease which inures to the benefit of the *cestui que trust*, he will be entitled to reimbursement for his outlay. (*Quackenbush v. Leonard*, 9 Paige, 334, 344; *Mathews v. Dragaud*, 3 Desau. 25-8; *McClanahan v. Henderson*, 2 Marsh. 388; *Morrison v. Caldwell*, 5 Monr. 426; *Kellogg v. Wood*, 4 Paige, 578.)

One question alone remains to be considered, and that is whether the receipt concludes this suit, and amounted to a final adjustment of all matters in controversy between the parties. The plaintiff alone signed the receipt, and it expressed full satisfaction of the judgment, which was the principal object of nego-

Grumley v. Webb.

tiation between the parties, and also of all claims and demands which the defendant had or held against the plaintiff. The language is exceedingly broad and comprehensive, but, like all other contracts, it must be interpreted and construed from existing facts, and in the light of surrounding and cotemporaneous circumstances. Evidence was taken at the trial in the court below as to what was actually settled between the parties, and what was intended to be released. Some of the evidence is in conflict and irreconcilable. The opposing attorneys understand the matter differently. But upon a review of all the evidence bearing upon this point, and the statement of the parties themselves, the conclusion is irresistible that the plaintiff thought he was compromising only the judgment actually obtained, and that he was receiving satisfaction and releasing his claim to that judgment only. He had no idea that the settlement included the second suit, which was pending and undisposed of in the Circuit Court.

The receipt, acknowledging satisfaction of the judgment rendered, he signed; and on the same day his attorneys, on their own responsibility, and without consulting him, signed an order for the dismissal of the pending suit. It is undoubted that he was ignorant of this dismissal for some time after it occurred. On the other hand, the defendant's testimony tends to show that defendant considered the settlement a complete adjustment of all differences growing out of plaintiff's claim on defendant; but I am impelled to the belief that neither party at the time apprehended that a suit of this character would be instituted. It was not contemplated nor thought of. Such being the case, we must see what construction the law will place upon the terms of the receipt.

In the case of *Vedder v. Vedder* (1 Den. 257), where the receipt was "one dollar in full of all demands to date," Judge Beardsley quoted the language of Lord Coke, that the word "demand" was the largest word in law except "claim," and said that a "release of all demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities,

Grumley v. Webb.

contracts, recognizances, statutes, commons," etc.; and, as authorities to sustain this view, he cites Bac. Abr., tit. Release, I; Litt. § 508; Co. Litt. 291, *b*; Edward Althan's case, 8 Rep. 299. But the receipt in that case was simply for one dollar in full of all demands to date, nothing being said respecting the particular demand which was paid; and, as it was received on an adjustment between the parties of mutual cases of tort, it was held to be binding on all cases of mutual dispute. The case, when properly examined and rightfully understood, does not militate against the universally-recognized doctrine that language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.

In an old book of great merit it is said: "On the rule of law that every man's deed shall be taken strongest against himself, and on what is laid down in Althan's case (8 Coke, 148) *generalis clausula*," etc., "it hath been insisted that general words in a release are to be taken strongest against the releasor, and are not to be qualified or restrained by any special recital. But herein the sure rule and distinction seems to be that where there are general words all alone in a deed of release they shall be taken more strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital." (Bac. Abr., tit. Release, K.)

In 2 Roll. Abr. 409, it is said that if a man receives £10 of another, and by his deed acknowledges the receipt thereof, and therefore releases, acquits, and discharges him of all actions, suits, debts, duties, and demands, by this release nothing is discharged but the £10, and the action and demands thereof; for the last words have reference to the first, and are so limited by them.

In Jackson v. Stackhouse (1 Cow. 122) the release given in evidence by the defendant discharged the judgment obtained against the mortgagors for two years' interest on the bond; it also contained general words: "in full of all debts, demands,

 Uhrig v. The City of St. Louis et al.

judgments, executions, and accounts, of whatsoever nature, in law or equity." Notwithstanding the extensive scope of this language, the court declared that it was settled that where there were general words alone in a deed of release they should be taken most strongly against the releasor; but where there was a particular recital, and then general words followed, the general words should be qualified by the particular recital. So, also, in *Littlefield v. Winslow* (19 Maine, 394), Shepley, J., in speaking on this subject, says: "Persons often use general language when speaking of the subject on which the mind is then employed. If another subject be presented to the mind in connection with it, the language usually gives some indication of it. And when it does not, if general language were not limited to the subject then under consideration, it would occasion mischiefs not only in the common business of life, but in the construction of contracts, and even in judicial proceedings. It was so clearly perceived that the language used should be considered as applicable to the subject of thought only, that it introduced the maxim, '*sensus verborum ex causa dicentis accipiendus est et secundum subjectum materiam.*'" (*S. P. Moore v. Magrath*, Cowp. 9, per Lord Mansfield; *Butcher v. Butcher*, 4 Bos. & Pul. 113; *Payler v. Homersham*, 4 Maule & S. 425; *Lyman v. Clark*, 9 Mass. 237; *McIntire v. Williamson*, Edw. Ch. 38.)

It necessarily follows that the receipt furnishes no obstacle to the plaintiff's asserting his rights in this suit. The judgment will be reversed and the cause remanded for further proceedings, to be had in conformity with this opinion.

Reversed and remanded. The other judges concur.

JOSEPH UHRIG, Respondent, v. THE CITY OF ST. LOUIS and FRANCIS ROMER, Appellants.

1. *Revenue — Street opening, tax assessments concerning — Constitutional construction of statute.*—It is the settled doctrine in this State that the special provisions of the act of March 24, 1868, amendatory of the St. Louis city charter (Adj. Sess. Acts 1868, p. 239), touching tax assessments for opening of streets, are not repugnant to the constitution. And the

 Uhrig v. The City of St. Louis et al.

decisions in this State are in perfect harmony with the whole current of adjudications in other States.

2. *Revenue — Street opening — Tax of ten per cent. against the city of St. Louis, constitutional.*— The particular provisions of the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 239, § 3), limiting the assessments for street opening, against the city of St. Louis, on account of the general benefit to be derived therefrom, to ten per cent., are lawful. The levy of the assessment upon adjoining property-owners is an exercise of the taxing power; and the Legislature, in the exercise of this power, was at liberty, in its discretion, to impose the whole burden of the cost of the proposed improvements upon them. And so it might, in its discretion, limit or extend the district to be taxed, and thus increase or diminish the sum to be paid by any particular proprietor. The imposition of a portion of the tax, not exceeding a tenth, upon the city at large, is to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint.
3. *Revenue — Ordinance for opening Washington avenue valid, although condition therein might be null.*— The ordinance enacted under the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 238), providing for the widening of Washington avenue at the junction of Jefferson avenue, in the city of St. Louis (ordinance 6,507), is valid, even though the condition thereto annexed—which provided that the ordinance should be null in case the Lindell Railway Company should not, within a limited time, indemnify the city, etc.—should be held invalid.

Appeal from St. Louis Circuit Court.

Uhrig, being the owner of a lot of ground on Washington avenue, brought this suit to enjoin the collection of benefits assessed against his property for the opening of a part of said avenue. The city council passed an ordinance for the opening of part of that avenue, and the land commissioner called a jury to assess the damages suffered by those whose property was proposed to be taken, and also assess benefits to pay those damages—part of which benefits were assessed against the city, and the residue against the adjoining proprietors, of whom plaintiff was one.

The bill sets up as grounds of relief: 1st, that the city charter, which provides that not more than ten per cent. shall be assessed against the city, for benefits to the public at large, is unconstitutional and void; 2d, that the ordinance under which the assessment was made is void, because it contained a condition that it should be null unless the Lindell Railway Company, within ninety days, gave bond to pay the damages (benefits) which might be assessed against the city for the opening of the street; 3d, that

Uhlig v. The City of St. Louis et al.

the verdict was irregular and void, because the jury assessed the value of the land proposed to be taken, and, in addition thereto, assessed the value of the improvements on the land.

The court made the injunction perpetual, and defendants bring the case here by appeal, after unsuccessful motions for a new trial and in arrest.

Reber, city counselor, for appellants.

I. The plaintiff's remedy is at law, and not in equity. (*Ewing v. City of St. Louis*, 5 Wall. 413; *Mayor of Brooklyn v. Meserole*, 26 Wend. 132; *Haywood v. City of Buffalo*, 4 Kern. 537; *Scott v. Onderdonk*, *id.* 9.) The remedy of plaintiff is, not by injunction, but trespass, if the proceedings are void; or by *certiorari*, if irregular. Injunction does not lie to restrain sheriff's sale on the ground of cloud. (27 Mo. 428.)

II. The provision of the statute requiring the city to pay not more than ten per cent. of the damages is constitutional. The power to assess benefits against the owners of property is not referable to the right of eminent domain, but to the taxing power; and it is discretionary with the Legislature to impose the whole or any part of the cost of opening or improving streets on the neighboring proprietors, as it chooses; and it may extend or limit the district to be taxed as it may choose, and thus diminish or increase the sum that any particular person is obliged to pay. (*Sedgw. on S. & C. Law*, 501-2; 18 Penn. St. 26; *Parks v. Boston*, 8 Pick. 218-228; *The People v. Mayor of Brooklyn*, 4 Comst. 418; *Newby v. Platte County*, 25 Mo. 258; *White & Garrett v. City*, *id.* 505.)

III. The condition of the ordinance may be void, but the ordinance itself is not vitiated thereby. (17 Mo. 529; *City of St. Louis v. Alexander*, 23 Mo. 513, 514.)

IV. There is no double or improper assessment or finding of the value of the property proposed to be taken.

V. The benefits, as they are called, or the amount which owners of adjacent property have to contribute to pay for the property taken, is a tax; and taxes are or may be always levied without special notice to the payers thereof.

 Uhrig v. The City of St. Louis et al.

Woerner & Kehr, for respondent.

I. The proper proceeding in this case is injunction. 1. Courts of equity will grant relief in all cases in which a wrong is threatened by inferior boards or tribunals of special jurisdiction. (*Am. Ins. Co. v. Fisk*, 1 Paige, 90; *Frewin v. Lewis*, 4 Myl. & C. 254; *Simpson v. Lord Howden*, 3 *id.* 99; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Burnett v. Cincinnati*, 3 Ohio, 73; *Anderson and Wife v. Hamilton County*, 12 Ohio St. 635; *Oakley v. Treasurer of Williamsburg et al.*, 6 Paige, 262; *Whitlock v. Duffield*, 2 Edw. 366; *Scotfield v. Lansing*, 17 Mich. 447.) 2. The writ of *certiorari* affords no adequate remedy. (R. C. 1825, pp. 155, 228, 398; R. C. 1835, pp. 129, 280; R. C. 1845, p. 243; R. C. 1855, p. 443; Gen. Stat. 1865, p. 688; *Alleyne v. Commissioners of Schodock*, 19 Wend. 342; *People ex rel. Porter v. Rochester*, 21 Barb. 656; *Houston v. Orr*, 1 Mo. 582; *Boren v. Weltz*, 4 Mo. 250; *Hann. & St. Jo. R.R. v. Morton*, 27 Mo. 317.) 3. The courts of Missouri have invariably recognized the right to the remedy by injunction in parallel and similar cases. (*Lockwood v. The City of St. Louis*, 24 Mo. 20; *Hann. & St. Jo. R.R. v. Morton*, 27 Mo. 317; *Risley v. The City of St. Louis*, 34 Mo. 404; *Fowler v. The City of St. Joseph*, 37 Mo. 228; *Farrar v. City of St. Louis*, case No. 6,452, St. Louis Circuit Court, October term, 1866; *Washington University v. Rowse*, 42 Mo. 308.)

II. Special tax laws are unconstitutional. (Const. Mo., art. IV, § 1.) 1. It is of the essence of law that it be permanent and uniform in its scope and operation; otherwise it is null. (*Domat's Civil Law*, Prel. Book, tit. I, § 1, XXI; 1 Blackst. Com. 44; 1 Bouv. Inst. 78; *Sharpless v. Mayor of Philadelphia*, 9 Har. 148; *Grimm v. Weissenburg School District*, 7 P. F. Smith, 437; *Crow v. The State*, 4 Mo. 264.) 2. But the act under consideration is neither general nor uniform; it violates the constitution, and is an unauthorized usurpation of power by the General Assembly. (*Van Horn's Lessee v. Dorrance*, 2 Dallas, 304; *Sutton's Heirs v. City of Louisville*, 5 Dana, 28; *Rice v. Danv. & Lane Turnpike Co.*, 7 Dana, 81; *City of Lexington v. McQuilliam's Heirs*, 9 Dana, 513; *People v. Mayor of Brooklyn*,

6 Barb. 209; James River & Kanawha Co. v. Turner, 9 Leigh, 313; Woodfolk v. Nash. & Chat. R.R. Co., 2 Swan, 422; Const. Mo., art. IV, § 27.) 3. The act is in violation of the constitutional inhibition against taxing property otherwise than according to its value (Const. Mo., art. I, § 30), and also of that provision of the constitution which requires that no property shall be exempt from taxation. (Const. Mo., art. XI, § 16.)

III. The law discriminates against private property-holders in favor of the city at large, in limiting the amount to be assessed against the city to one-tenth of the whole tax levy.

IV. In limiting the amount to be assessed against the city, the Legislature has usurped judicial power.

V. The act is against the plain spirit of the declaration of rights, because it provides for a trial without notice, before an officer acting as a judge between the parties while he is in the employment of one of them; and because it gives to one of the parties the power to annul the judgment, while the others are bound thereby.

VI. The ordinance upon which the proceedings are based is void. It was not passed by the authority which alone has power to pass ordinances for the city. (Barton v. Nimrod, 8 N. Y. 433; Clark v. City of Rochester, 18 N. Y. 605; Parker v. Commonwealth, 6 Barr. 507; Rice v. Foster, 4 Har. 479; Maize v. The State, 4 Ind. 342, affirmed in 7 Ind. 635.)

VII. The land commissioner had no authority to instruct the jury as he did in this case. 1. His instruction was erroneous in law. 2. He had no power to instruct on questions of fact. (Merritt *et al.* v. Given *et al.*, 34 Mo. 98; Turner v. Lohr, *id.* 461; Moffat v. Conklin, 35 Mo. 453.) 3. The land commissioner is no judge with common-law powers, and can not instruct at all. (Chamberlain v. Brown, 2 Doug. 120, note.)

VIII. The jury gave double damages in assessing first the value of the land, and then the value of the component parts of the land, allowing damages for both.

IX. There was no authority, under the act, to assess or render judgment against any of the parties, except the city, for the cost of the proceeding before the land commissioner.

Uhrig v. The City of St. Louis et al.

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to enjoin the collection of an execution issued by the St. Louis land commissioner against the plaintiff, for the amount of benefits assessed against him, as accruing from the opening of a portion of Washington avenue, in the city of St. Louis. It is alleged that the assessment was irregular and illegal, the illegality consisting in the supposed unconstitutionality of all laws which assume to impose or authorize special tax levies, and in the special provisions of the act of March 24, 1868. (Adj. Sess. Acts 1868, p. 239, § 3, amendatory of the St. Louis city charter.) The main point insisted upon is that these special tax assessments are repugnant to the provisions of the constitution. This proposition has been pressed upon our attention with thoroughness and ability, but the argument comes too late. So far as this State is concerned, the question must be treated as settled in opposition to the views maintained by the plaintiff's counsel. And the decisions here are in perfect harmony with the whole current of adjudications in other States. (Garrett v. City of St. Louis, 25 Mo. 505; Newby v. Platte County, 25 Mo. 258; Lockwood v. City of St. Louis, 24 Mo. 20; Risley v. City of St. Louis, 34 Mo. 404; People v. Mayor of Brooklyn, 4 Comst. 419, and see appendix on p. 607 and following, where the authorities on this subject are fully collected.)

It is insisted, however, in the case at bar, that the assessment against the plaintiff was illegal because of the particular provision of the act of March 24, 1868, limiting the assessment against the city, on account of the general benefits, to ten per cent. of the sum total of the damages assessed. This point has been argued upon the theory that the assessment of benefits is not a legislative but a judicial act.

The levying of the assessment was an exercise of the taxing power. That is conceded. The Legislature, therefore, in the exercise of this power, was at liberty, in its discretion, to impose the whole burden of the cost of the proposed improvement upon the neighboring proprietors to be benefited thereby; and so it might, in its discretion, limit or extend the district to be taxed,

Uhrig v. The City of St. Louis et al.

and thus increase or diminish the sum to be paid by any particular proprietor. The imposition, therefore, of a portion of the tax, not exceeding a tenth, upon the city at large was to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint. (Sedg. on S. & C. Law, 501-2; 18 Penn. St. 26; Parks v. Boston, 8 Pick. 218; 4 Comst. 418, *ubi supra*, and cases cited.)

But it is insisted that although the law were unobjectionable, still the ordinance enacted under it is void by reason of the condition thereto annexed, which provides in substance that the ordinance shall be null in case the Lindell Railway Company should not, within a limited time, indemnify the city against its share of the anticipated assessments, or assume the payment thereof.

In 18 Penn. St. 26 (the Hancock street case), the statute provided that in case the benefits did not equal the damages for property taken in the extension of the street, the street should not be opened; and no objection was taken on that ground.

In Parks v. Boston, 8 Pick., it was held that the taking of a bond from an individual to contribute to the expense of the proposed improvement did not vitiate the proceeding. But the condition of the ordinance may be rejected as void, while the residue of the enactment remains in force, unaffected by the condition. (State v. Field, 17 Mo. 529.)

In The City and County of St. Louis v. Alexander, 23 Mo. 484, it was held that a condition at law was valid. The objection to the ordinance is not well taken.

Various objections have been urged against the regularity of the proceedings under the ordinance. These objections are of a technical character, and there is no equitable merit in the complaint founded upon them. The verdict does not warrant the construction of a double assessment of damages attempted to be put upon it. There is nothing to indicate any unfairness in the transaction. The proceedings conformed substantially to the law and the ordinance under which they were had. The law and the ordinance being unobjectionable, it is not claimed that the plaintiff's property was not subject to assessment, or that it was

Garvin's Adm'r et al. v. Williams et al.

assessed relatively higher than that of other parties within the inscribed limits.

The judgment must therefore be reversed and the petition dismissed. The other judges concur.

GARVIN'S ADM'R *et al.*, Appellants, *v.* JOHN P. WILLIAMS
et al., Respondents.

1. *Guardian and ward—Donations, how generally treated.*—Gifts, grants or donations obtained by attorney from client, spiritual adviser from advisee, trustee from *cestui que trust*, parent from child, and guardian from ward, are watched by courts with the most scrutinizing jealousy, and generally held to be presumptively void.
2. *Wills—Guardian and ward—Will to guardian by ward—Presumptions of law concerning.*—In a suit to set aside a will, it appeared that the donee became the guardian of deceased while the latter was a mere child; that deceased always resided in his family; that he surrendered everything to his guardian's judgment, and reposed the most implicit confidence in him in every respect; that a day or two after becoming of age, and while residing in the house of his guardian, deceased effected a settlement with him, and on the day following made his will, disinheriting all his kindred and relations, and conveying all his property to the guardian; that about a month afterward, and while still under his care, he died: *held*, that the will was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it.

Appeal from St. Louis Circuit Court.

Glover & Shepley, with whom were *Harris*, and *Crews*,
North & Laurie, for appellants.

Whenever any one standing in a fiduciary relation receives a benefit from his dependent, the law looks on the act with suspicion, and either holds it void or so far condemned as to require from the donee proof that no undue influence or fraud induced the transaction. But the court below decided that the fiduciary relation of guardian and ward attached no suspicion to, and raised no presumption against, the will; and further, that all the facts mentioned in plaintiff's second instruction did not fix on defendants the *onus* of disproving undue influence. Appellants contend as follows:

I. The settlements made of the guardian's accounts, September 13, 1860, were invalid. (*Hicks v. Hicks*, 3 Atk. 247; *Kilby v. Snead*, 2 Molloy, 230; *Revett v. Harvey*, 1 Sim. & Stu. 502; *Fish v. Miller*, Hoffman's Ch. 273; *Wedderburne v. Wedderburne*, 4 Myl. & Cr. 49; *Waller v. Armsted*, 2 Leigh, 11; 1 Willard's Eq. 183, 185; *in re Van Horne*, 7 Paige, 46; *Melish v. Melish*, 1 Sim. & Stu. 138; 1 Sto. Eq. 355, § 317; Redf. on Wills, 20; *Gorst v. Lownds*, 11 Sim. 433; 1 Black, 463; 2 Kent, 233.)

II. The fiduciary relations subsisting at the execution of the will raised a presumption that it was procured by the undue influence of the guardian. (*Jones v. Goodrich*, 5 Moore's P. C. Cas. 20; 1 Sto. Eq. 311, 312, §§ 318, 320; *id.* §§ 260-307; *Wells v. Middleton*, 1 Cox's Ch. 112; *Woodhouse v. Shipley*, 2 Atk. 535; *Marsh v. Tyrrell*, 2 Hagg. Eccl. 84; *Hylton v. Hylton*, 2 Ves. Sr. 547; *Swisshelm's Appeal*, 56 Penn. St. 486; *Hatch v. Hatch*, 9 Ves. 292; *Wright v. Vanderplank*, 8 DeG., McN. & DeG. 146; *Bury v. Openheim*, 26 Beav. 598; *Chambers v. Crabbe*, 34 Beav. 459; *Meek et al. v. Perry et al.*, 36 Miss. 243; Willard's Eq. 185; *Taylor v. Taylor*, 8 How. 199; *Ormond v. Hutchinson*, 13 Ves. 51; *Morse v. Royal*, 12 Ves. 370; *Wright v. Proud*, 13 Ves. 137; *Gaither v. Gaither*, 20 Ga. 721; *Huguenin v. Basely*, 14 Ves. 273; *Von Stets v. Comyn*, 12 Ir. Eq. 641-2; *Dawson v. Massey*, 1 Ball & B. 229; *Ingraham v. Wyatt*, 3 Hagg. Eccl. 466; *Wood v. Downs*, 18 Ves. 127.) The extraordinary value of this donation is of itself a ground of suspicion. (*Taylor v. Taylor*, 8 How. 183; *Mulhazen v. Marum*, 3 Dru. & War. 336; *Popham v. Brooke*, 5 Rus. Ch. 10; *Griffith v. Robbins*, 3 Mad. 105; *Thompson v. Judge*, 3 Dru. 315; *Dent v. Robinson*, 4 Myl. & Cr. 277; *Harrell v. Harrell*, 1 Duvall, 203; *Custance v. Cunningham*, 12 Beav. 363; *Whelan v. Whelan*, 3 Cow. 537; *Sears v. Shaeffer*, 6 N. Y. 272; *Howel v. Hanson*, 11 Paige, 598; *Nottige v. Prince*, 2 Giff. 269.) The general course of authority applies the doctrine of fiduciary relation to wills as well as deeds. In 3 White & Tudor's Leading Cases in Equity, 127, it is said that "the general rule is, a deed or will in favor of one who stands in the position of confidential adviser will be set aside unless the transaction is shown or appears

Garvin's Adm'r et al. v. Williams et al.

to be perfectly fair and regular, without any admixture of improper or undue influence." On this point *vide* 34 Conn. 451; Meek *et al.* v. Perry and Wife, 36 Miss. 256; Morris v. Stokes, 21 Ga. 575; Breed v. Pratt, 18 Pick. 117; Marsh v. Tyrrell, 2 Hagg. 84; Ingraham v. Wyatt, 3 Hagg. 466; Gaither v. Gaither, 20 Ga. 721; 1 Paige, 176; Middleton v. Sherburn, 4 Young & Colly. 358; Crispell v. Dubois, 4 Barb. 397; Lake v. Ranney, 33 Barb. 68; Newhouse v. Goodwin, 17 Barb. 258; Darley v. Darley, 3 Bradf. 507; Tyler v. Gardner, 35 N. Y. 559; Lee v. Dill, 11 Abb. Pr. 218; 3 Cow. 576. A careful reading of the cases above cited will show that in some of them the instruments in question have been void absolutely because of the fiduciary relation. In every one of them the presence of the relation has raised a presumption against the validity of the act, no matter what it was—will, deed, release, settlement, or bond. (*Vide* further, Casborn v. Barshaw, 2 Beav. 78; 3 White & Tud. L. C. in Eq. 114-5; Crispell v. Dubois, 4 Barb. 397; Newhouse v. Goodwin, 17 Barb. 258; Lake v. Ranney, 33 Barb. 68; *in re* Greenfield's Estate, 14 Penn. St. 505; Smith v. Kay, 7 H. Lords, 779; Lee v. Dill, 11 Abb. Pr. 218; Hatch v. Hatch, 9 Ves. 292; Taylor v. Taylor, 8 How. 199, 202; Goddard v. Carlisle, 9 Price, 169; Archer v. Hudson, 7 Beav. 558; Osmond v. Fitzroy, 3 P. W. 131, n. 1; Maitland v. Irving, 15 Simon, 437; Chambers v. Crabbe, 34 Beav. 459; Maitland v. Backhouse, 16 Simon, 58; Sercombe v. Saunders, 34 Beav. 382; Espy v. Lake, 10 Hare, 262; Gale v. Wells, 12 Barb. 85; Darley v. Darley, 3 Bradf. 507; Bergen v. Udall, 31 Barb. 9; Davis v. Davis, 4 Giff. 417; *in re* Welsh, 1 Redf. Sur. 244; Nesbit v. Lockman, 34 N. Y. 167; White v. Meade, 2 Ir. Eq. 420; 3 White & Tud. Lead. Cas. 141; Morris v. Stokes, 21 Ga. 552, 575; Huguenin v. Basely, 14 Ves. 273; Vreeland v. McClelland, 1 Bradf. 420, and cases cited; Maury v. Silber, 2 Bradf. 134, 151; Redf. on Wills, 529.)

Sharp & Broadhead, and *Knox*, for respondents.

I. The instructions requested by appellants, and refused, were properly refused, because the existence or recent termination of

Garvin's Adm'r et al. v. Williams et al.

the relationship of guardian and ward does not raise a legal presumption of the invalidity of the will of the ward, but is a fact to be considered and duly weighed, in connection with all other facts in the case, in determining the question of undue influence. (Jones v. Goodrich, 5 Moore's P. C. Rep. 16-41; Butlin v. Barry, 1 Curtis' Eccl. Rep. 614; Barry v. Butlin, 1 Curtis, 637; Henderson v. Weatherell, 5 DeG., McN. & G. 301-313; Rhodes v. Bates, 1 Law Rep. Ch. App. 253; Dawson v. Macey, 1 Ball & B. 219; Redf. on Wills, 528, 531, §§ 41, 45; Reeve's Dom. Rel., ed. 1862, pp. 444, 445; Beard *et al.* v. Pratt, 18 Pick. 115; Morris v. Stokes, 21 Ga. 552; White v. Bailey, 10 Mich. 155; Jenckes *et al.* v. Probate Court of Smithfield, 2 R. I. 256; Gaither v. Gaither *et al.*, 20 Ga. 709; Means v. Means, 15 Ohio, 90; Newhouse v. Goodwin, 17 Barb. 236; Wilson v. Moran, 3 Bradf. 172.)

II. In proceedings to set aside a probated will, the presumption is in favor of the validity of the will (Farrell v. Brennan *et al.* 32 Mo. 323 *et seq.*; McClintock v. Curd, 32 Mo. 411; 8 Dana, 315); and it would be error and lead to confusion to instruct the jury that a certain state of facts raised a contrary presumption. It would at best but assert a presumption against a presumption, amounting to nothing, and only calculated to confuse. (Beacher v. Marsh, 15 Ohio St. 103; Copeland v. Copeland, 32 Ala. 512.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding instituted in the Circuit Court of Chariton county, and taken, by a change of venue, to St. Louis county by the appellants, who are heirs at law and personal representatives of W. D. Peticrew, to set aside the probate of his will. The respondents are beneficiaries under the will.

It appears that the deceased, Peticrew, was left an orphan when a mere child, inheriting a large estate, and that he had neither brothers nor sisters. The respondent John P. Williams was appointed guardian of his person and curator of his estate; and from the time of such appointment Peticrew resided in the family of Williams till the time of his death, except when he was absent at school. During all this time Williams had the exclusive

Garvin's Adm'r et al. v. Williams et al.

management and control of the estate, and Peticrew seems to have given him his unreserved confidence.

Before Peticrew became of age he was attacked with consumption, and the record shows that it was painfully evident that he could not long survive. He was born September 12, 1839, and therefore arrived at age on the 11th day of September, 1860. Two days prior to his becoming of age an attorney was employed to examine the accounts between him and his guardian, and on the 13th of the same month a settlement was made in the County Court—Peticrew receiving the note of his guardian for the amount due him, and entering a release of record discharging him and his securities. On the next day, the 14th of September, Peticrew, still being at Williams' house, made and executed his will, giving the whole of his large estate to Williams and his family, with two exceptions, and totally disinheriting all his kindred or relations. In the succeeding month of December he died.

From the view we have taken of the case, as now presented, it will be unnecessary to comment upon or bestow any particular attention on the great mass of testimony embodied in the bill of exceptions. We must first examine whether the court below tried the case upon a correct theory.

Upon the trial the plaintiffs offered an instruction reciting all the facts in the case, and asked the court to declare, as a conclusion of law thereon, that the alleged will was presumptively procured by undue influence. The concluding paragraphs of the instruction are in these words: "And that the alleged will was made in the house of J. P. Williams, while said Peticrew was residing therein, on September 14, 1860, said Peticrew being only two or three days of age, and before the influence created over said Peticrew by the relations (guardianship) aforesaid had ceased to exist. The presumption arising from such facts is that the alleged will was procured by the undue influence of J. P. Williams, and that presumption can only be repelled by satisfactory proof that no undue influence was used to procure the same." This instruction the court refused to give.

There is no subject in the whole range of equity jurisprudence

Garvin's Adm'r et al. v. Williams et al.

where its salutary principles have been more often invoked than in those cases where donations have been obtained by persons standing in some confidential, fiduciary, or other relation toward the donor, and where they may have exercised dominion over him. Transactions of this kind taking place between attorney and client, spiritual adviser and advisee, trustee and *cestui que trust*, parent and child, and guardian and ward, are watched by courts with the most scrutinizing jealousy, and generally held to be presumptively void.

Whilst all those confidential relations are essentially governed by the same principles, we shall confine this discussion mainly to the law as adjudged and written in reference to guardian and ward. And here it must be observed that the rule is applied not exclusively while the relation actually exists, but for such period of time thereafter as may be sufficient to insure complete emancipation on the part of the ward, and afford him an independent and unbiased opportunity to investigate for himself and see that everything is correct.

Chancellor Walworth said, in one case, that it was not the practice of the court to discharge the guardian absolutely, and to order his bond to be given up immediately upon the infant's arriving at age, although he had settled with the guardian; that the ward, notwithstanding such settlement, was entitled to a reasonable time, after he became of age, to investigate the accounts of the guardian, and to surcharge and falsify the same if, upon such investigation, he found anything wrong. (*In re Van Horne*, 7 Paige, 46; Willard's Eq. 182.)

Mr. Justice Story discusses the question with his accustomed clearness. He says: "In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts, the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that during the existence of the guardianship the transactions of the guardian can not be binding upon the ward if they are of any disadvantage to him; and, indeed, the relative situation of the parties imposes a general disability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between

guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian; for in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased—as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian.” (1 Sto. Eq. Jur. § 317.) The English editors of *Leading Cases in Equity* lay it down as settled doctrine that a donation from a ward to a guardian is looked upon with great jealousy; and if it has been obtained immediately upon the ward attaining his majority, it will be set aside upon the presumption of undue influence having been used by the guardian, and even a considerable time after that event, upon proof that the influence of the guardian over the ward still existed; and if undue influence can be fairly presumed from the relative positions of the parties, or proved, the trouble or loss of time the guardian may have sustained in fulfilling the duties of his office will not avail him as a defense or excuse for accepting or obtaining such a donation. (3 White & Tud. L. C. in Eq. 490.)

In *Hylton v. Hylton*, 2 Ves., Sr., 547, an uncle, who was trustee and acted as guardian to his nephew, upon coming to an account and delivering up the estate to his nephew, who was then about twenty-two years of age, took from him a general release and written discharge, and also a voluntary grant of an annuity of £60. Lord Hardwicke set the annuity aside upon a bill filed by the nephew. “Where,” said he, in delivering his opinion, “a man acts as guardian, or trustee in the nature of guardian, for an infant, the court is extremely watchful to prevent that person taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts and delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery

or force—by good usage fairly meant, or bad usage imposed—to take such an advantage, and therefore the principle of the court is of the same nature with relief in this court, on the head of public utility; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokerage bonds. All depends upon public utility, and therefore the court will not suffer it; though perhaps in a particular instance there may not be any actual unfairness.”

In *Hatch v. Hatch*, 9 Ves. 292, a guardian, who was an incumbent of a living, obtained from his ward, soon after she became of age, a conveyance of the advowson of the living, expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, etc.; and of ten shillings to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterward became her husband. She continued to live with her guardian for about four years afterward, when she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against conveyance. Lord Eldon, considering that she had never been her own mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time that had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up and canceled.

In the course of his able judgment he declared: “This case proves the wisdom of the court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for antecedent duty. There may not be a more moral act, or one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee, having done his duty, the *cestui que trust* taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court can not permit it, except quite satisfied that the act is of that nature, for the reason often given.” He adds that “in discussing whether it is an act of rational consideration—an act of pure

Garvin's Adm'r et al. v. Williams et al.

volition, uninfluenced — that inquiry is so easily baffled in a court of justice that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression. And, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."

Again, in the case of *Huguenin v. Basely*, 14 Ves. 299, the same learned chancellor reviews the cases, and places his decision on the ground of public utility; and in *Wood v. Downes*, 18 Ves. 127, the same doctrine is reiterated. Since those decisions were rendered there are many cases reported in the English books, some of which might seem to qualify or mitigate the stringent and inflexible rule laid down by the early chancellors; but an examination will show that where gifts or donations have been upheld, between parties where confidential relations existed, it has been under special and peculiar circumstances, and where an entire absence of undue influence was apparent.

Where a case comes fairly within the rule we do not see that it is in the least abated. In the case of *Gale v. Wells*, 12 Barb. 84—where a guardian, soon after the ward became of age, but while the latter was still at college, and before the guardian had settled his accounts with the ward, procured the ward's indorsement to a note made by the guardian for the payment of a precedent debt owing by the guardian to a third party, who took the note and indorsement with notice of the relations between the maker and indorser—it was held that the note could not be enforced against the ward. The court declared that the law inferred undue influence in such a case, without allowing an inquiry as to whether it actually existed or not, on account of the difficulty of establishing it and the danger to wards of leaving that question open while the relationship of guardian and ward existed.

In *Meek et al. v. Perry et al.*, 36 Miss. 190, David McKinnie died, leaving two daughters, Mary and Louisa. Michael McKinnie, their uncle, qualified as their guardian. Five months after Louisa had arrived at age, being in low health, she made her will, giving all her property to her uncle, the guardian, and disinher-

Garvin's Adm'r et al. v. Williams et al.

iting her sister, and died four days afterward. The Supreme Court of Mississippi set the will aside, and said that in transactions between guardian and ward, the law, upon a principle of public policy, and to protect the ward against the efforts of overweening confidence and self-delusion, and the infirmities of a hasty, precipitate judgment, presumed the existence of undue influence on the part of the guardian, and therefore such dealings were *prima facie* void, and would be so held unless the guardian showed, by the clearest proof, that he dealt with the ward exactly like a stranger, taking no advantage of his influence over him, or of his superior knowledge in relation to the subject matter of the transaction, and that the ward's act was the result of his own volition and upon the fullest deliberation. (See, also, Gaither v. Gaither, 20 Ga. 721; Taylor v. Taylor, 8 How. 183; De Montmorency v. Devereux, 7 Clark & Fin. 188; Wells v. Middleton, 1 Cox, 125; Fish v. Miller, 1 Hoff. Ch. 273.)

One of the ablest, most satisfactory, and clearest-reasoned cases that I have seen, concerning grants or donations to persons occupying confidential or fiduciary relations, is Greenfield's (2 Harris, 489). There the court held a grant by a woman eighty-six years of age, of all her property to four persons in trust, to apply the proceeds to her support during life, and to sell and distribute the whole after her death, valid—thus sustaining her capacity to grant—but struck out a gift or bequest of \$10,000 to each of the trustees, on the ground that one was her friend and confidential adviser, and another her attorney, and that there was nothing to take the case out of the general rule that gifts to agents and trustees are *prima facie*, if not absolutely, invalid. In their most lucid opinion the court say: "The deeds were prepared by Mr. Bouvier, who for some time prior had been the legal adviser and confidential attorney of Mrs. Greenfield. In this instance he acted upon the express suggestion and recommendation of Mr. Howell, in whom the donor reposed the most implicit faith. It is evident that both of these gentlemen exercised over her an almost unbounded influence, and were thus enabled to give direction to her thoughts and actions. Mr. Rush also stood toward her in a fiduciary relation; and the

fourth trustee, Mr. Roberts, was brought into the business by Mr. Howell, under a recommendation well calculated to command her utmost trust. For a considerable time before the conveyance it is proved she was improvident, if not extravagant, in the expenditure of her fortune, and, in reference to it, singularly open to solicitation and importunity. In the language used at *nisi prius*, she was generous to a fault, and seems to have been haunted by a passion for giving. While indulging this inclination for expenditure, the deeds in question were made. By these is reserved to the trustees the sum of \$40,000, being \$10,000 to each, professedly as a compensation for assuming the burden of a trust which might have been terminated in a year, and, according to every probability, would not endure for a very long period. As the award for the future management of an estate worth at the utmost only five times as much, the sum named has been designated as inordinate; yet this fact will by no means justify a charge of actual fraud against the parties who principally managed this transaction. As already intimated, there is no proof in the cause to warrant so grave an accusation, especially against individuals enjoying the eminent reputation which all accord to these trustees. I can very well imagine how, without a violation of conscience, they might conceive themselves entitled to a princely remuneration under the circumstances then surrounding the donor. But, in spite of this concession, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to forbid an allowance of the claim. In this feature the case presents what is called a constructive fraud springing from the confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. As it has been often said, the principle stands independently of such elements of active mischief. It is founded upon a motive of general policy, and is designed to protect a party, so far as may

Garvin's Adm'r et al. v. Williams et al.

be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament. It has been beneficially applied to those confidences which owe their birth to the relations of parent and child, guardian and ward, trustee and *cestui que trust*, and, above all, attorney and client. To guard against the strong influences which these connections are so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void which between other parties would be open to no exception."

From the foregoing authorities, and many others which might be cited, it will be seen that the rule in regard to the bestowment of gifts, grants, or donations, where a trust or confidence exists between the parties, is well established. That cases may be found in which it has been relaxed, or where judges, owing to particular circumstances, have denied its application, is not doubted. But the rule is just in itself, founded on high principles of morality, public policy and utility, and its force ought not to be impaired. It is, however, contended that, although it may be applicable to deeds and transactions between the living, it does not extend to wills. But I am unable to perceive any distinction, either in reason, principle, or authority. The text writers speak of the rule generally, and apply it to all transactions alike, and many of the cases are direct adjudications where wills were in issue. Mr. Greenleaf, in his treatise on the law of evidence, lays down the doctrine "that being under guardianship at the time is *prima facie* evidence of incapacity, but open to explanation by other proof."

The case of *Breed v. Pratt*, 18 Pick. 115, is clear and conclusive upon the subject of guardian and ward, where a will was made during the existence of that relation. Although the direct question there was the mental capacity of the testator, still the remarks of the court are equally applicable to the one now under consideration. Shaw, C. J., in delivering the opinion of the court, said: "Inasmuch as the relation of guardian and ward places the person and property of the ward in the custody of the guardian, where a will is made beneficial to the

Garvin's Adm'r et al. v. Williams et al.

guardian, it is to be taken as strong evidence bearing upon the point of the mental capacity of the testator and his freedom of will and of action; but it is to be taken as evidence which may be met and controlled by counter proofs. It is *prima facie* evidence of insanity and incapacity to make a will; and therefore it is incumbent on those who would establish the will to show, beyond reasonable doubt, that the testator had such mental capacity and such freedom of will and action as are requisite to render a will legally valid."

It would be indeed strange and remarkable if any distinction were made, and the doctrine did not apply to wills; that the law should watch with such extreme jealousy, and throw every safeguard around the living, and deny it to those who were just ready to sink into the grave on account of disease; that, on grounds of public utility, men of health should be protected because by reason of certain confidence they were placed in a situation where they were liable to be imposed on, yet when they were placed in the same relation, emaciated by sickness, and bereft to a great extent of their intellectual capacity, they should fall a prey to cupidity and avarice.

When advantage is taken of persons living, and they have been deprived of their rights by undue influence, their wrongs may be made known, and a remedy is easily afforded; but where a will is procured from a person stricken with disease from which he never recovers, who is to disclose the injustice which has been perpetrated and unfold the means which led to its execution? It is true that while the testator is living, his will is ambulatory, and may be altered or revoked; but this principle is of no consequence when he is induced to make and publish it in view of impending death, when no opportunity of reconsideration is open to him. In this case young Peticrew resided in the family of Williams; the evidence shows that he surrendered everything to Williams' judgment, and that he reposed the most implicit confidence in him in every respect. How that confidence was acquired, and with what view, we will not stop to inquire. The extraordinary haste with which the settlement was pushed immediately on the ward's coming of

age, and the rapidity with which the will followed on the next day, needs explanation.

At the time of making the settlement, Peticrew was too sick to attend to any business, and manifested little or no interest in what was going on; his declaration in regard to the whole matter was that he had confidence in Williams, and supposed it was all right. When the settlement was concluded he returned to Williams' house, and there, on the next day, made his will. It does not appear that Williams or any of his family who are beneficiaries were present in the room at its execution; but if they were instrumental in procuring the disposition that was made of the property, they would most probably be absent. The hand that directs such acts most generally withdraws from the public gaze. Then Williams started south with Peticrew, and was with him till he died.

In all this there may have been nothing unfair or unjust. The kind treatment that Peticrew received from Williams and his family may have sprung from generous and disinterested motives, and not resulted from selfish or sinister purposes. But they are the only persons who are capable of explaining the matter satisfactorily. Williams was placed in a confidential relation, where the most exact good faith was required of him—where it was incompetent for him to take a benefit for himself without showing that the benefit flowed from the free, unbiased, independent will and uninfluenced volition of his ward.

Under the circumstances in which the will was made it was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it. The instruction, therefore, hereinbefore alluded to, which was refused by the court, should have been given. I have not been able to find any other error in the record.

That young Peticrew labored under a delusion in respect to the designs of his aunt Garvin will not admit of a moment's doubt. His declarations were competent to show the state of his mind, but they were not admissible against the defendants to prove that they had used the language which poisoned him against his

Murtaugh v. The City of St. Louis.

relatives. They were mere hearsay, and therefore the court did not err in rejecting them.

The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion. The other judges concur.

JAMES MURTAUGH, Respondent, v. THE CITY OF ST. LOUIS,
Appellant.

1. *Damages — Corporations — City of St. Louis — Hospital — Non-paying patient.*—The city of St. Louis is not liable in damages to a non-paying patient at the City Hospital for injuries resulting from the negligence and misfeasance of the officers and servants of that institution.
2. *Damages — Corporations — Negligence — Charity cases.*—Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties. But where the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the consequence of such acts or omissions on the part of officers and servants.

Appeal from St. Louis Circuit Court.

Reber, city counselor, for appellant.

A municipal corporation is not civilly liable for the nonfeasance, or malfeasance, or misfeasance, of its officers and servants while engaged in the discharge of the public political duties of the corporation. (*City of Richmond v. Long's Adm'r*, 17 Grat. 375; *Dargan v. Mobile*, 31 Ala. 469; *Stewart v. New Orleans*, 9 La. An. 461; *Bailey v. New York*, 3 Hill, 538; *Martin v. Mayor of Brooklyn*, 1 Hill, 550; *Prather v. City of Lexington*, 13 B. Monr. 559; *Western College v. Cleveland*, 12 Ohio St. 375.) For analogous cases see *Reardon v. St. Louis County*, 30 Mo. 555; *Sherburne v. Yuba County*, 21 Cal. 113. This case is exactly like the one at bar, except the suit was against a county instead of a city.

Murtaugh v. The City of St. Louis.

O'Neil & Quigley, for respondent.

The City Hospital is established by the city of St. Louis for the benefit of the indigent sick of the city, and the city is liable for the gross negligence and want of skill on the part of her employees or agents, although the victim happens to be a charity or non-paying patient.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff was a non-paying patient in the St. Louis City Hospital. While there he suffered physical injuries, which he alleges were caused by the negligence and misconduct of the hospital officials and servants. This suit is brought against the city to recover damages for the alleged injuries. At the trial in the Circuit Court, the verdict and judgment were for the plaintiff. The defendant moved in arrest. This brings up the question whether the city is liable for the negligence and misfeasance of the hospital authorities and servants in the administration of this particular charity. No provision of the city charter or of any ordinance is cited in support of the action; nor is any authority or any specific legal principle invoked in its aid. The action is conceded to be of new impression, and is without precedent in this State. There have been, however, various adjudications upon the general question of the liability of municipal corporations for the acts and omissions of their officers and servants. The general result of these adjudications seems to be this: where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants. (*Bailey v. New York City*, 3 Hill, 531; *Martin v. Brooklyn*, 1 Hill, 550; *City of Richmond v. Long's*

Murtaugh v. The City of St. Louis.

Adm'r, 17 Grat., Va., 375; Sherburne v. Yuba County, 21 Cal. 113; Dargan v. Mobile, 31 Ala. 469; Stewart v. New Orleans, 9 La. An. 461; Prather v. City of Lexington, 13 B. Monr. 559.)

In Bailey v. New York, 3 Hill. 539, Nelson, C. J., in delivering the opinion of the court, says: "The distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit from them, the corporation, *quoad hoc*, is to be regarded as a private company."

Substantially the same view is taken in the case of The City of Richmond v. Long's Administrator (*ubi sup.*), where the whole subject is elaborately reviewed and exhaustively treated. The city of Richmond was sued for the loss of a slave who was alleged to have died in consequence of negligence and bad treatment while an admitted inmate and patient of the city hospital. It was held that the action would not lie, and for the reason that the city corporation was not civilly liable for the consequences flowing from the acts and neglects of its agents and employees while in the discharge of these public and charitable duties. Sherburne v. Yuba County, 21 Cal. 113, is also a hospital case, and it was held that the action would not lie.

The decision is placed upon the ground, however, that the county was only a *quasi* corporation. Reardon v. St. Louis County, 36 Mo. 555, is placed on the same ground; it being there held that the county could not be held liable for its own neglect of duties enjoined by the Legislature, in the absence of a statute expressly imposing the liability.

The Richmond city case is fully in point, and announces a sound and judicious rule for that and parallel cases. It is but an application of the principle laid down by Chief Justice Nelson in the New York city case, 3 Hill, 539. Applying that principle to the facts of the case before us, it becomes obvious that the

Fisher v. The City of St. Louis.

action can not be maintained. The motion in arrest should have been sustained.

The judgment of the Circuit Court is therefore reversed, and judgment for the defendant ordered. The other judges concur.

WILLIAM T. FISHER, Respondent, v. THE CITY OF ST. LOUIS
Appellant.

1. *Practice, Civil—Pleading—Want of demand.*—Want of demand by plaintiff, to be of any avail to defendant, must be pleaded.
2. *Practice, Civil—City of St. Louis—Contract—Suit for price—Tax bills.*—The city of St. Louis agreed with plaintiff to pay for certain work in tax bills. The work was done, but the tax bills proved to be invalid. *Held*, that plaintiff properly brought suit to recover the contract price for the work, without returning the void bills and demanding others; nor was he obliged to sue for failure to issue and deliver proper tax bills.

Appeal from St. Louis Circuit Court.

Reber, city counselor, for appellant.

The action should have been brought for failing to issue and deliver to plaintiff proper tax bills, and not for work done.

Grace, and Clover, for respondent.

CURRIER, Judge, delivered the opinion of the court.

On the 17th of September, 1866, the plaintiff made two contracts with the city for filling up certain ponds situated on private property within the city limits, which had been considered as nuisances. The contracts provided that the work should be paid for "in special tax bills assessed against the owner or owners of the property where the work was done," and that the delivery of such tax bills to the contractor should be in "full payment" for such work.

The plaintiff performed the service contemplated by the contract, and received, as in payment, certain tax bills, which proved to be invalid, uncollectable, and worthless, having been issued without competent legal authority. This suit is brought to

Fisher v. The City of St. Louis.

recover the contract price of the work, accompanied with an offer to surrender the tax bills, which are alleged to be illegal and void. The answer denies the alleged invalidity of the tax bills, and avers that the delivery of them to the plaintiff, and their acceptance by him, constituted full payment and satisfaction of the claim sued on.

The precise ground of defense alleged in the answer, however, is not insisted upon here. It is not here claimed either that the bills were valid, or that their acceptance constituted a payment and satisfaction of the plaintiff's demand. It is claimed, nevertheless, that the city had the requisite power to issue legal tax bills binding on the property-owners; and that, having that power, it was not bound to pay in any other manner than in the bills, as stipulated in the contract; and that the plaintiff can therefore have no right of action, notwithstanding the invalidity of the bills delivered to him, "until he demands other bills and they are refused him."

This line of defense is wholly outside the issues made by the pleadings. It is not alleged in the answer, and is not available here. The defense alleged in the answer is payment. That defense has broken down, and the point now made in respect to demand and refusal comes too late, whatever might be thought of its merits. The objection is that the plaintiff failed to return the void bills and demand others. This fact, if of any materiality, should have been pleaded. (Gen. Stat. 1865, p. 691, § 34; 39 Mo. 383; 43 Mo. 145.) But we are not inclined to regard the fact as material. It was the duty of the defendant to correct its own mistakes, and to tender payment of the admitted indebtedness, whether in money or tax bills. But it is suggested that the action should have been brought for failing to issue and deliver to the plaintiff proper tax bills, and not for work done. We think the action well brought. The plaintiff had rendered the stipulated service, and was entitled to compensation. If he had not been paid, it was his right to sue for the value of the work. (Wetmore v. Campbell, 2 Sandf. 341; see *id.* 350-1.)

Judgment affirmed. Judge Bliss concurs. Judge Wagner absent.

Wellman v. Wickerman.

HENRY WELLMAN, Plaintiff in Error, v. WILLIAM WICKERMAN,
Defendant in Error.

1. *Sale—Seizure of mare by government—Condemnation and sale of by—War power.*—Suit was brought for the possession of a mare. The proof showed that she was taken by direct authority of the government of the United States, to meet a pressing exigency; that she was used in the military service, and then condemned and sold under the order of the department commander, with a direct and unequivocal assertion of title in the United States. Defendant became the purchaser, and suit was brought for her recovery by the original owner. *Held*, that plaintiff was not entitled to recover. Under the exigencies of the case, the government could seize and condemn the property, and impart good title by sale. If the claim were valid it should be brought against the United States.

Error to Sixth District Court.

Redd, for plaintiff in error.

D. P. Dyer, and *Ledford*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This was action in the Ralls county Circuit Court for the possession of a mare. The facts are few and simple, and appear from the record to be these: in the fall of 1864 the plaintiff's mare was taken or pressed into the service of the United States by soldiers, and used by the government. At the time the mare was taken plaintiff was requested to go to Hannibal and get a receipt for her. This, it seems, he never did. The mare was afterward turned over to Joel K. Shaw, a quartermaster in the army of the United States, appointed and commissioned by the President. While the mare was in the possession of the quartermaster she was branded "I. C.," denoting that she had been inspected and condemned; and the letters "U. S." were also branded upon her, indicating the claim and ownership of the government. She was sold at Warrensburg, Mo., at a government sale, by the quartermaster, acting under orders and direction of Maj. Gen. Dodge, at that time commanding the department of the Missouri. Under this sale the mare was purchased by the person from whom defendant derives title. The court refused

Wellman v. Wickerman.

the instructions of the plaintiff to the effect that if the jury believed from the evidence that the plaintiff neither sold nor delivered the mare to the United States nor any officers thereof, then a sale by the United States or her officers vested no title in the defendant. Instructions were given, at the instance of the defendant, that if they found the facts as substantially stated above, then the verdict should be for defendant. The jury found for defendant, and judgment was entered on that finding, which judgment was affirmed in the District Court, and the case is brought here by error.

This case is entirely different from *Wilson v. Crocket*, 43 Mo. 216. In that case there was no evidence to show how the horse came into the possession of the quartermaster; it was never condemned, nor was it branded, nor were there any *indicia* to show that the government asserted any title to it. There was a complete absence of evidence to show that it came into the hands of the quartermaster by any lawful authority.

This case presents a very different view. Here the mare was taken by the direct authority of the government, to meet a pressing exigency. She was used in the military service, and then condemned and sold under the order of the department commander, with a direct and unequivocal assertion of title in the United States.

In *Coolidge v. Guthrie*, 8 Am. Law Reg., N. S., 22, the action was trover to recover the value of certain cotton. The facts found showed that in July, 1862, Gen. Curtis, commanding an army of the United States, took military possession of the town of Helena, in the State of Arkansas. That State was then in rebellion against the United States. The cotton was raised on farms belonging to Gen. Pillow, who was, at the time of the seizure of the cotton, in the military service of the rebel government.

The legal title and ownership of the cotton, however, at the time of its seizure by Gen. Curtis, was in the plaintiff Coolidge. He was a resident of Arkansas, but was in no wise engaged in the rebellion. All the facts relating to the cotton were known to the defendant Guthrie. Under these circumstances, and with full

Williams v. Wickerman.

knowledge, Guthrie purchased the cotton from Gen. Curtis, who acted on his own responsibility, no act of Congress having at that time been passed authorizing and regulating such seizures. Mr. Justice Swayne, sitting in the circuit, held that the court had no jurisdiction; that the seizure was made as an act of war, and its validity was not triable in a municipal court, in a common-law proceeding. It is true that in that case the seizure was made in a State in rebellion against the government, where belligerent rights were granted, and where all property was regarded as enemies' property. (The prize cases, 2 Black. 687; Mrs. Alexander's cotton, 2 Wall. 417; Maura v. Insurance Co., 6 Wall. 1.) Judge Swayne, in delivering his opinion, said that no action would lie against Gen. Curtis for the seizure, and that, consequently, no liability would attach to his vendee.

In the case of *Yost et al. v. Stout*, 4 Cold. 205, the Supreme Court of Tennessee repeated the doctrine laid down in *Mitchell v. Harmony*, 13 How. 128, and said: "Occasions may arise in the exigency of the service when an officer may destroy private property to prevent its falling into the hands of the public enemy, or where an officer who is charged with a particular duty may impress private property and take it for public use; and then the government would be bound to compensate the owner, and the officer would not be a trespasser. In all such cases the danger must be immediate and impending, or the necessity for the public service so urgent as not to admit of delay for the civil authorities to provide the means which the occasion called for."

It is said by Kent, "there are many cases in which the rights of property must be made subservient to the public welfare. The maxim of the law is that a private mischief is to be endured rather than a public inconvenience."

In *Drehman v. Stifel*, 41 Mo. 185, this court declared that for property taken for public use, or property destroyed by military authority, the government, and not the officer, was responsible. It would be a most singular anomaly to say that the officer was exempt—that the government was responsible to the individual whose property was taken—and yet, after the government has assumed the responsibility, used the property,

Wellman v. Wickerman.

condemned and sold it for a valuable consideration, that the innocent vendee could be deprived of his rights at the suit of the original owner.

The anomalous condition in which the civil war placed us renders it quite impossible to obtain exact precedents. The cases have generally turned on hostile seizures, and where such was the fact they all agree that recourse must be had to the government only. (See the learned and elaborate judgment of Lord Mansfield in *Lindo v. Rodney*, Doug. 613, note; *Elphinstone v. Bedreechund*, 1 Knapp, P. C. 316.)

The occasion that invoked the impressment of the plaintiff's mare is a part of the history of the State. Martial law prevailed. It was at the time that Gen. Sterling Price, at the head of a formidable Confederate force, invaded our territory. The occasion was emergent, calling for immediate and pressing action on the part of the military arm of the government to resist and expel the invaders. As the enemy were all mounted, it was necessary to have mounted troops to meet them, and hence the order for the impressment of horses. These horses were taken by the government in the exercise of a pressing necessity and by virtue of its war power; and the government thereby became responsible to the owners for their value. Some were killed or died in service; others, after they were no longer needed, were condemned and sold on government account. By this action the government asserted a complete title, and assumed all liability. The evidence is positive that the plaintiff's mare was condemned by the military, acting under the authority of the government, and sold by its express direction. The officers had jurisdiction of the subject matter, and their action is not reviewable here.

Such a step, besides being utterly futile, would result in the greatest injustice. Persons knowing that the government had not only the possession, but also claimed title, and that the property had been condemned, expended their money with the belief and expectation that they were acquiring a good title. We have not the means, if we had the power, which would justify us in going behind the action of the officers in making the condemnation, and judging of its legality.

Harper v. The Indianapolis & St. Louis R.R. Co.

If the plaintiff has a good and valid claim, it is against the government, and he should appeal to it for justice and remuneration, but he can not be permitted to maintain this proceeding against the defendant; wherefore, I think the judgment should be affirmed. The other judges concur.

THOMAS L. HARPER, Appellant, v. THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, Respondent.

1. *Practice, Civil—Pleadings—Allegations.*—In an action for damages against a railroad company, an allegation that it was the duty of defendant to employ a suitable engineer, and that it failed and neglected to do so, does not authorize proof that a fireman, in the absence of the engineer, did manage and control the locomotive. The petition should allege that defendant authorized or allowed the fireman to do such act.
2. *Practice, Civil—Instructions.*—The giving of instructions not based on evidence is erroneous.
3. *Agent—Liability of principal.*—The same degree of negligence which unfits a party for employment in the first place will equally unfit him for a continuance therein, his negligent conduct being known to his employer.

Appeal from St. Louis Circuit Court.

Plaintiff was a minor and sued by his next friend.

Bell, and Sherzer, for appellant.

A company is responsible to its servants for its own negligent acts. (Snow v. H. R.R., 8 Allen, 445; Keegan v. Western R.R., 4 Seld., N. Y., 175; Noyes v. Smith, 28 Verm. 62; Ryan v. Fowler, 24 N. Y. 413; Wright v. N. Y. C. R.R., 25 N. Y. 565; Warner v. Erie R.R. Co., 39 N. Y. 478; Patterson v. Wallace, 28 Eng. Law & Eq. 50; Marshall v. Stewart, 33 Eng. Law & Eq. 7; Wilson v. Merry, 3 H. L. 326.) It is bound, in duty to its servants, to employ servants competent in their respective spheres, and to use safe machinery; and if it knowingly transgresses, it becomes liable for all injuries sustained. (1 Redf. on Rail., 3d ed., 520; Frazier v. Penn. R.R., 38 Penn. St. 104; McDermott v. P. R.R., 30 Mo. 116; see, also, authorities above cited.)

C. W. Hanna, and Garesche & Mead, for respondent.

Harper v. The Indianapolis & St. Louis R.R. Co.

CURRIER, Judge, delivered the opinion of the court.

According to the plaintiff's brief, "this is an action brought to recover damages for injuries sustained through the fault and negligence of the company in allowing a fireman, in the absence of the engineer, to manage and control the locomotive engine" attached to the train of which the plaintiff was conductor. If this is an accurate characterization of the complaint and cause of action, then there is much force in the views presented in the able brief filed in the cause for the plaintiff. But these views are based on a possible theory of the facts developed at the trial, rather than upon the allegations of the petition.

The plaintiff was in the employment of the defendant as the conductor of a construction train; and while thus employed was thrown from the train and seriously injured. He seeks to recover damages of the defendant on the ground that the injury was caused by the negligence of the defendant in the non-employment of a suitable engineer to control and manage the engine attached to said train.

The petition avers "that it was the duty of the defendant to employ a competent engineer to take charge of and manage the locomotive engine used in drawing said train; and that the defendant failed and neglected to perform this, its said duty." The petition then proceeds to narrate the incidents which are supposed to have eventuated in the alleged injury, giving the time, place, circumstances, and instrumentalities preceding and attending the principal event, to-wit: the injury to the plaintiff; and to deduce that injury from the alleged negligence of the defendant in the non-employment of a suitable engineer.

Now, the *gravamen* of the charge consists in this: that it was the duty of the defendant to employ a suitable engineer, and that it failed and neglected to do so. The remaining averments pertain to time, place, etc., whereby it is sought to connect the injury of plaintiff with the negligence of the defendant, in the particulars stated, as the source and procuring cause of the casualty.

The gist of the matter, according to the petition, lies in the

Harper v. The Indianapolis & St. Louis R.R. Co.

imputed non-employment of a suitable engineer, and not in "allowing a fireman, in the absence of the engineer, to manage and control the locomotive." There is no allegation that defendant either "authorized" or "allowed" this; nor is there any averment to the effect that the defendant in any manner countenanced this supposed "negligent act." The petition is barren of averments of that character.

The court, therefore, in settling the instructions, was perfectly right in putting out of view the fact that the "fireman was, at the time of the accident, managing and controlling the engine," for it is not alleged that the defendant ever "authorized or permitted," directly or indirectly, the fact in question. It is alleged, indeed, that the fireman was in charge of the engine, but it is not alleged or intimated that the defendant had any responsibility in that matter, except as it was responsible for the character of the engineer, which brings us back to the original inquiry: was the engineer a competent and suitable person for the place he was filling? This was the main question for the jury, under the pleadings, and it was neither overlooked or disregarded by the court.

This disposes of the main proposition pressed upon our attention by the plaintiff's counsel. Nevertheless, the judgment must be reversed on other grounds. In regard to the question of contributory negligence, the court directed the jury that, if they believed from the evidence that the injury complained of "occurred while plaintiff was in the voluntary performance of an act not within the sphere of his duties as conductor," then he was not entitled to recover. There was clearly no evidence on which to base this instruction, and it was for that reason erroneous. It was addressed to a material issue in the case, and we can not know what effect it may have had on the minds of the jury, although the inquiry addressed by them to the court indicates that the verdict turned upon another issue.

Nor am I prepared to assent to the phraseology of the instruction given in response to the inquiry of the jury, wherein the court informs them that if the engineer employed by the defendant was competent at the time of the original employment, then

✓

Pike v. Megoun et al.

defendant would not be liable for his negligent acts, unless his his subsequent negligence was known to his employer, and was also gross in its character. The epithet "gross" is inapt and misleading. For that degree of negligence which would have rendered the party unfit for the place in the first instance, would equally unfit him for a continuance therein after the appointment, his negligent conduct being known to his employer. He should be discharged for the same measure of negligence which would have unfitted him for the original employment. (See 1 Redf. on Rail. 520; Ormond v. Holland, 1 El., Bl. & El. 202.)

The plaintiff's instruction No. 5, regarding the *quantum* of damages, states a correct rule, provided that the jury had found, upon proper instructions, that the plaintiff, a minor, had been emancipated from the parental service and control, and had thereby become entitled to his own earnings. (Reeve's Dom. Rel., Park & Bald. 422, note 2, and the cases cited in that note.) As the matter stood, the instruction was properly refused.

I do not deem it necessary to examine the remaining instructions, or pass any judgment or criticism thereon.

For the reasons assigned, the judgment is reversed and the cause remanded, the other judges concurring.

ABRAHAM M. PIKE, Plaintiff in Error, v. SAMUEL MEGOUN *et al.*,
Defendants in Error.

1. *Officer — Judicial and ministerial acts — Civil responsibility.*—A civil action does not lie against judges or magistrates, or persons acting judicially in a matter within the scope of their jurisdiction, however erroneous their decisions or corrupt and malicious their motives. But when duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains when judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a judicial capacity, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice.

2. *Elections — Registering officers — Duties and powers not fully judicial.*— The officers of registration, under the act of 1865 (Gen. Stat. 1865, App. p. 904), were neither judges nor judicial officers in a legal sense. Their duties were partly ministerial and partly judicial. Although sections 9 and 20 of that act devolved on them extensive powers and required an exercise of judgment, they were not thereby to be considered judicial officers to the full extent.
3. *Elections — Registering officers — Liability of, prior to the act of 1865 — Construction of that act.*— Prior to the enactment of any registration law the judges of election exercised essentially the same power in determining the qualification of a voter as the registering officers now exercise under the present system; yet all the cases hold that an action may be maintained against a judge of an election where he refuses, when acting in that capacity, to permit a qualified voter to exercise the right of suffrage; but as the judge of the election had to exercise his discretion, and acted *quasi* judicially, it would be necessary to allege and prove that such refusal was knowingly wrongful, malicious, or corrupt. By the act of 1868 (Sess. Acts 1868, § 23), the Legislature seems to have placed the same construction upon the act of 1865, touching the character of the registering officers.
4. *Legislature — Exposition of laws by — What weight attached to.*— A legislative exposition in regard to the construction of statutes, though not controlling authority, is still entitled to weight.
5. *Elections — Registration act of 1865 — Registration officers — Liability for refusing to receive votes.*— Under the law as it stood in 1866 (Gen. Stat. 1865, p. 904), the registering officers were not responsible for damages for refusing to register a person, however erroneous that refusal might have been, if it was produced merely by a mistake in judgment. But if the refusal was corrupt or actuated by malice, or to gratify personal spite, they would not be protected, but would be liable to an action by the person injured.

Error to Sixth District Court.

Lamb, Lewis, Lancaster, and Williams, for plaintiff in error.

I. The demurrer ought not to have been sustained. 1. A judge or judicial officer, when acting judicially and within the limits of his jurisdiction, is not liable for any erroneous decision, whether made honestly or from corrupt and malicious motives. (*Yates v. Lansing*, 9 Johns. 395; *Pratt v. Gardner*, 2 Cush. 63; *Burnham v. Stevens*, 33 N. H. 252; *Bailey v. Wiggins*, 5 Harr. 472; *Chickering v. Robinson*, 3 Cush. 543; *Evans v. Foster*, 1 N. H. 375; *Bumpus v. Fisher*, 21 Texas, 562; *Cunningham v. Bucklin*, 8 Cow. 183; 2 Gray, 120.) 2. Neither a judge when acting ministerially, nor a ministerial officer when acting judicially, is

Pike v. Megoun et al.

liable for erroneous decisions honestly made. (Reed v. Conway, 20 Mo. 22, 52-3; Jenkins v. Waldron, 11 Johns. 113; Humphrey v. Kingman, 5 Metc. 162; Davis v. Strong, 31 Verm. 332; Stone v. Augusta, 46 Me. 137; Hovey v. Mayo, 43 Me. 322; State v. Dunnington, 12 Md. 340; Tozer v. Child, 7 Ellis & Bl. 377; 40 Eng. Law & Eq. 85; Peavey v. Robbins, 3 Jones, N. C., 339; Stone v. Graves, 8 Mo. 151; Bevard v. Hoffman, 18 Md. 480; Morgan v. Dudley, 18 B. Monr. 693; Vanderheyden v. Young, 11 Johns. 159.) 3. Both the judge when acting in a ministerial capacity, and the ministerial officer when acting in a *quasi* judicial capacity, are liable for errors committed from willfulness, corruption, and malice. (Reed v. Conway, 20 Mo. 52-3; Bacon v. Benchly, 2 Cush. 100; Caulfield v. Bullock, 18 B. Monr. 494; Tozer v. Child, 40 Eng. Law & Eq. 89; Harris v. Whitcomb, 4 Gray, 433; Chrisman v. Bruce, 1 Duvall, 63; Bevard v. Hoffman, 18 Md. 480; Stone v. Augusta, 46 Me. 137.)

II. To deprive a rightful voter of the exercise of his privilege is such a personal injury as will sustain an action for damages. (1 Hill. on Torts, 85, and notes; *id.* 142; Ashley v. White, 2 Raym. 948; 2 Hill. on Torts, 418; Henshaw v. Foster, 9 Pick. 312.) Election officers are liable for wrongfully rejecting a voter, even without any proof of malice or corruption. (Blanchard v. Stearns, 5 Metc. 298; Henshaw v. Foster, 9 Pick. 312; Kilham v. Ward, 2 Mass. 236; Lincoln v. Hapgood, 11 Mass. 350; Capen v. Foster, 12 Pick. 485; Ashley v. White, 2 Raym. 950.)

Green & Wilson, for defendants in error.

I. The act of the defendants in error, in excluding the plaintiff from registration, was the result of a judicial investigation or trial; and the decision and judgment rendered thereon was a judicial, and not a ministerial act. (Stone *et al.* v. Graves, 8 Mo. 148; Wertheimer v. Howard, 30 Mo. 420.) Civil action for damages will not lie against a judge or judicial officer, acting judicially, within the sphere of his jurisdiction, for any errors he may commit, "however erroneous his decisions, or corrupt and malicious his motives." (2 Chit. Pl., 13th Am. ed., 78; 2 Saund.

Pike v. Megoun et al.

Pl. & Ev. 613; Broom's Leg. Max. 61, 65, 69; Yates v. Lansing, 5 Johns. 282; Vanderheyden v. Young, 11 Johns. 158; 3 Bouv. Inst., art. II, p. 181; Kavanaugh v. Brooklyn, 38 Barb. 232; Stone *et al.* v. Graves, 8 Mo. 148; Lennox v. Grant, *id.* 254; Rochester White Lead Co. v. City of Rochester, 3 Comst., N. Y., 466; Weaver v. Devendorf, 3 Denio, 120; Wilson v. The Mayor, etc., 1 Denio, 599.)

II. The case of Reed v. Conway, 20 Mo. 22, cited by the plaintiff in error, bears only upon the liability of the ministerial officer acting in a *quasi* judicial capacity, and therefore does not affect the case at bar.

WAGNER, Judge, delivered the opinion of the court.

This was an action by plaintiff against the defendants, as registration officers within and for Ralls county, for refusing to register plaintiff as a legally qualified voter. The petitioner avers that prior to the general election in 1866 the plaintiff was a resident of said county, and had been for many years previous thereto; that he was legally qualified and entitled to be a voter therein; that he took and subscribed the oath of loyalty prescribed by the constitution of this State, and in all respects complied with the requirements of the law, and that his qualification as a voter was well known to each and all of the defendants at that time; but that said defendants, "conspiring together to cheat and defraud plaintiff out of his right to exercise the elective franchise, knowingly, willfully, corruptly, and unlawfully, jointly and severally, did refuse and exclude the name of plaintiff as a qualified voter, and refused to register him, or suffer him to be registered as such."

To this petition there was a demurrer, assigning as grounds of objection that the defendants, in their capacity of registration officers, acted judicially, and were not responsible in a civil proceeding. There was judgment for defendants on the demurrer in the Circuit Court, which was affirmed by a division of the judges in the District Court.

The question presented is one of considerable embarrassment, on account of the multiplied, various, and conflicting opinions

Pike v. Megoun et al.

which have been entertained concerning ministerial and judicial acts. The proposition is undoubted, that wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt or willful, he may be impeached or indicted, but he can not be prosecuted by an individual to obtain redress for the wrong which may have been done.

In all the cases, the rule is nowhere better laid down than by Fox, J., in *Taafe v. Downes*, 3 Moore, P. C. 51. "The principle at law," he said, "of exemption from being sued for matters done by judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated for the benefit of the people, by insuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land and the dispensation of justice in this country, and is founded on the very framework of the constitution. It is to be met with in the earliest books of the law, and has been continued down to the present time without one authority or *dictum* to the contrary. I think myself called upon in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner as may be necessary to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect—not to injure or infringe—it appears to be most necessary that a judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution. They are only answerable for their judicial conduct in the high court of Parliament; and without the existence of this principle it is utterly impossible that there could be such a dispensation of justice as would have the effect of protecting the lives or property of the subject. A judge must—a judge ought—to be uninfluenced by any personal

consideration whatever operating on his mind when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine that it would poison the very source of justice, and introduce a system of servility utterly inconsistent with the constitutional independence of the judges—an independence which it has been the work of ages to establish—and would be utterly inconsistent with the preservation of the rights and liberties of the subject.”

In a very recent case in the Supreme Court of the United States (Randall v. Brigham, 7 Wall. 523), it was declared to be the established law, and as the result of the authorities, that judicial officers are exempt from liability in a civil action for their judicial acts done within their jurisdiction, and judges of superior or general authority are exempt from such liability, even where their judicial acts are in excess of their jurisdiction, unless, perhaps, where the acts in excess of their jurisdiction are done maliciously or corruptly.

An action, then, does not lie against judges or magistrates, or persons acting judicially in a matter within the scope of their jurisdiction, however erroneous their judgment or corrupt and malicious their motives. (Cases *supra*, also, Stone v. Graves, 8 Mo. 148; Yates v. Lansing, 5 Johns. 282; 9 Johns. 395; Cunningham v. Bucklin, 8 Cow. 178; Briggs v. Wardwell, 10 Mass. 358; Doswell v. Impey, 1 Barn. & Cress. 169; Phelps v. Sill, 1 Day, 315.) But there is a limit to this judicial immunity. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. (Wilson v. The Mayor, etc., 1 Den. 599; Rochester White Lead Co. v. City of Rochester, 3 Comst. 463.) And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature

Pike v. Megoun et al.

judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty. (Reed v. Conway, 20 Mo. 22; Caulfield v. Bullock, 18 B. Monr. 494.) In the case of Weaver v. Devendorf, 3 Denio, 117, it was adjudged that the duty of assessors in determining the value of property was in its nature judicial; but the learned judge who delivered the opinion in that case went further, and declared that when they thus acted, in a matter over which they had jurisdiction, they were not civilly responsible, however erroneous their decision might have been, or however malicious the motives which produced it. Previous to that time it is believed that no case can be found, either English or American, where the doctrine of exemption, applied to a ministerial officer, although acting judicially, was held in as broad terms. The language was not necessary to the decision of the case, for the judge expressly says that there was no proof whatever that the assessors acted otherwise than honestly, and there was no attempt to show that they acted willfully or corruptly. The decision of the case was right upon the facts, but the broad manner in which exemption from liability was declared, as to the action of the officers, must be regarded as *dicta*.

As far as the real decision in Weaver v. Devendorf goes, it has been steadily adhered to and followed by the courts in New York, and it is invariably held that the office of assessor, in determining what property is subject to and what is exempt from taxation, is judicial; and the assessor, in determining such questions, acts judicially, and is not liable for errors committed in arriving at his conclusions upon that subject. (See Barhyte v. Shepherd, 35 N. Y. 238, where the cases are cited and reviewed.) But in all the cases the question was as to making the officers liable for a mistake or error in judgment, and there was either no allegation or proof of fraudulent conduct, corruption, or malice. These cases, therefore, are in perfect harmony and accord with the rule above laid down, that to fix responsibility on the officer it is

necessary to show that his action was willful and corrupt, and against his honest convictions in respect of his duty.

The next inquiry is, were the officers of registration, under the act of 1865, judicial officers or not? In the full sense of the term, the answer must certainly be in the negative. They were neither judges nor judicial officers in the legal meaning of these characters. Their duties were partly ministerial and partly judicial; that is, they were required to exercise a discretion and judgment when determining the qualifications of those presenting themselves for registration. Duties of a similar character frequently devolve on sheriffs and other ministerial officers; but it was never supposed that they became judicial officers in consequence thereof. They have none of the attributes of a judge—a person whose office is to administer justice in courts held for that purpose, who is authorized by law to hear and determine causes, and who holds courts statedly for the accomplishment of that end. The general nature and object of the office of registrar is to make a list of the voters, to register all who have the qualifications prescribed by the constitution, and who will take the oath of loyalty required by that instrument, and who are not proved by evidence, or known to the officer, to have committed any of the acts or been guilty of any of the offences enumerated in section 3 of article II of the constitution. The executive act of making the list is ministerial; but, for the purpose of ascertaining the necessary qualifications, the ninth section of the act of 1865 gave the registration officers power to examine, under oath, any person applying for registration as to his qualifications as a voter, and empowered them before entering the name of any person upon the register of qualified voters, diligently to inquire and ascertain that he had done none of the acts specified in the constitution as causes a disqualification; and if, from their own knowledge, or from evidence brought before them, they should be satisfied that the person so applying was disqualified under any provision of the constitution, they should not enter his name as a qualified voter, though he might have taken and subscribed to the oath of loyalty. The section further invested the officers of registration with the power of adminis-

tering oaths to all parties appearing before them for registration or as witnesses. The twentieth section gave the registration officers, while discharging their duties, the powers of a judge of the Circuit Court, for the preservation of order at and around the place of registration, and also authorized them to summon and compel the attendance of witnesses for the purpose of ascertaining the qualifications of persons registered or applying for registration.

The above provisions devolve on the registration officers extensive powers and require an exercise of judgment, but they are not thereby to be considered judicial officers to the full extent. Throughout the whole act there is a blending of ministerial and judicial functions.

Prior to the enactment of any registration law, the judges of election exercised essentially the same power in determining the qualification of a voter as the registering officers now exercise under the present system; yet all the cases hold that an action may be maintained against a judge of an election where he refuses, when acting in that capacity, to permit a qualified voter to exercise the right of suffrage; but as the judge of the election had to exercise his discretion, and acted *quasi* judicially, it would be necessary to allege and prove that such refusal was knowingly wrongful, malicious, or corrupt.

The Legislature seems to have placed the same construction on the act of 1866, for, in the 23d section of the registration act of 1868, they provide "that the board of registration or any member thereof, shall not be held responsible for damages for refusing to register any one as a legal voter in accordance with the spirit and intent of this act, or the constitution of Missouri." This shows the general interpretation given to the law by the law-making body. A legislative exposition in regard to the construction of statutes, though not controlling authority, is still entitled to weight. (*Rex v. Loxdale*, 1 Burr. 447; *Constant v. The People*, 11 Wend. 511; *Henry v. Tilson*, 17 Verm. 479.)

The conclusion is that, under the law as it stood in 1866, the registration officers were not responsible for refusing to register a person, however erroneous that refusal might have been, if it was

The First National Bank of Hannibal v. Meredith.

produced merely by a mistake in judgment. But if the refusal was corrupt, or actuated by malice, or to gratify personal spite, they would not be protected, but would be liable to an action by the person injured.

I think the demurrer should be overruled and the defendants have leave to answer. The judgment will therefore be reversed and the cause remanded. The other judges concur.

THE FIRST NATIONAL BANK OF HANNIBAL, Respondent, v. JOHN D. MEREDITH, Collector, Appellant.

1. *Revenue—Act of Congress—Bank shares—Taxes—Assessments made, how.*—Under the provisions of section 41 of the act of Congress of June 3, 1864, re-enacting and amending the act of February 25, 1863 (U. S. Laws 1863-4. p. 112), the county collector should make his assessments for taxes on bank shares against the shareholders personally, and has no right to collect the tax by selling the property of the bank, or the shares or other property of the shareholders, except that of the delinquent.
2. *Revenue—Banks—Act of Congress—Illegal tax—Injunction, when proper.*—Injunction by a bank organized under act of June 3, 1864, to restrain the collection of taxes, is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief.
3. *Revenue—Banks, under act of Congress of June 3, 1864—Assessments against banks for tax on shares—Injunction—Demurrer.*—Suit by a banking institution organized under act of Congress of June 3, 1864, to enjoin the collection of taxes assessed against itself on its bank shares, has no equity. The bank, as a corporation, will lose nothing if the shares of its stockholders are sold. The shareholders are the ones who suffer, and they, if any one, are entitled to relief. In such suit demurrer will properly lie for that reason.

Appeal from Sixth District Court.

W. M. Boulware, for appellant.

I. The collector had the right under State authority to tax the shares of stock owned in this corporation. (*Lionberger v. Rowse*, 43 Mo. 67.)

II. An injunction will not lie to restrain the sale of personal property for taxes. (*Sayre v. Tompkins*, 23 Mo. 443; *Deane v. Todd*, 22 Mo. 90; *Lockwood et al. v. St. Louis*, 24 Mo. 20; *State v. P. G. R. R.R. Co.*, 32 Mo. 496.)

The First National Bank of Hannibal v. Meredith.

III. Injunction does not lie in this case. If the assessment is void, the collector who levies upon personal property under it is a trespasser *ab initio*, and responsible on his official bond. (State to use Hann. & St. Jo. R.R. v. Shacklett, 37 Mo. 280, and cases cited.) If not void, but merely irregular, respondent was provided by law with an easy and summary remedy, and there was no ground for equitable interposition. (See Missouri cases above cited; *Mintern v. Hays*, 2 Cal. 590; *Wilson v. Mayor*, etc., 4 E. P. Smith, 675; *Robinson v. Gaar*, 6 Cal. 273; *Insurance Co. v. New York*, 33 Barb. 322; *Munson v. Minor*, 22 Ill. 303; *Chicago v. Frary*, *id.* 34; *Van Rensalaer v. Kidd*, 4 Barb. 17; *Livingston v. Hollenbeck*, *id.* 9; *Dodd v. Hartford*, 25 Conn. 232; *Green v. Mumford*, 5 R. I. 478; *Mechanics, etc., v. De Bolt*, 1 Ohio, 591; *Hughes v. Kline*, 30 Penn. 227; *Methodist, etc., v. Mayor, etc.*, 2 Md. Ch. Decis. 78.)

IV. If an injunction will lie to restrain the sale of these shares, it will not lie at the evil of the bank.

Green & Wilson, for respondent.

I. Shares of national bank stock can only be taxed by State authority in strict conformity with the act of Congress of June, 1864. (*Van Allen v. The Assessors*, 3 Wall. 573-581; *Bradley et al. v. The People of Illinois*, 4 Wall. 459; *The People ex rel. Duer v. The Tax Commissioner of New York City*, 4 Wall. 244; *Wright, auditor, etc. v. Stilz*, 6 Am. Law Reg., N. S., 471-5; *Frazer v. Siebern et al.*, 16 Ohio, 614; 6 Am. Law Reg., N. S., 475-93; *Markoe et al. v. Hartranft et al.*, *id.* 487-93; *Hubbard et al. v. Supervisors of Johnson County*; *Davenport National Bank v. The County of Scott et al.*; *National Bank of Oskaloosa v. Young*, — Iowa, —.)

II. The State revenue act of 1863, requiring banking corporations to pay the taxes assessed on the shares of individual stockholders, does not conform in the mode of taxation with the requirements of the national bank act of June 3, 1864, and as to the shares of national bank stock is therefore inoperative and void. (3 Wall. 573-586; *St. Louis Building and Savings Association v. Lightner*, 42 Mo. 421; *Lionberger v. Rowse* 43

The First National Bank of Hannibal v. Meredith.

Mo. 67; *Markoe et al. v. Hartranft et al.*, 6 Am. Law Reg., N. S., 489-93.)

III. The petition states facts sufficient to constitute a cause of action. The court in this case had authority to grant an injunction. (1 Sto. Eq. Jur. §§ 32, 33, 64, 76.)

BLISS, Judge, delivered the opinion of the court.

The Hannibal Court of Common Pleas allowed an injunction against defendant as tax collector for Marion county, to restrain him from the collection of taxes upon the bank shares illegally assessed against the bank. The petition sets forth the organization of the bank, under the law of Congress of June 3, 1864, with a capital of \$100,000, and the names of the shareholders, showing that some of them resided in said Marion county, some of them in the State outside of the county, and that some were non-residents of the State, and averring that they were not liable to be taxed upon their shares except according to the act of Congress. The petition sets out the statutes of Missouri, in relation to the collection of taxes from banks, as contained in the revision of 1865, and avers that, in accordance with these provisions, the taxes of all the shareholders, for their stock, were assessed by said collector against the bank, and, in default of payment, that he seized and advertised for sale, to satisfy the same, the whole one thousand shares, comprising its capital stock. The petition charges that the shares are not taxable by law, and that their seizure is unlawful, and avers that their sale will greatly damage the bank by impairing its credit and stability, and injure the owners of the stock by casting a cloud over its title and destroying its convertibility, for which the law furnishes no remedy unaided by equity. The petition also claims that neither the plaintiff or its stockholders are liable to taxation, except at the rate of one per cent. upon its capital, in accordance with the assessment upon certain of the old banks of the State; and, after claiming other irreparable damage from the threatened action of defendant, asks for an injunction. A preliminary injunction was allowed, and, upon appearance and demurrer to the petition, it was made perpetual.

The First National Bank of Hannibal v. Meredith.

The action of the Court of Common Pleas was affirmed in the District Court, and defendant appeals.

Two questions are raised by this record: first, the liability of the plaintiff to pay the taxes charged to its stockholders; and second, if not liable, its right to equitable relief. The first of these questions has been fully considered and decided by this court since this petition was filed, in *Lionberger v. Rowse*, 43 Mo. 67. The action complained of was not the same as in the case at bar, but the collector sought to collect the tax assessed upon the plaintiff's shares in a national bank, of the plaintiff himself, and not of the bank, and the court held that his action was a substantial compliance with the act of Congress. The error of the present defendant, or rather of the assessor, was not in seeking to collect taxes upon the shares of a national bank, but in assessing them against the bank. The liability of the shareholders to taxation by State authority is recognized by section 41 of the act of Congress of June 3, 1864, which is a re-enactment and amendment of the act of February 25, 1863; for by its terms it guards against any construction, that shall exempt "all the shares" from assessment by State authority "at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The case of *Lionberger v. Rowse* fully settles what this rate may be. But while the assessor may obtain of the bank a list of the shareholders as provided by our statute, he should make the assessment against them personally, and hence has no right to collect the tax by selling the property of the bank, or the shares or other property of any shareholder, except that of the delinquent. But, notwithstanding the error of the assessor, there is no equity in this petition, for two reasons: first, it is well settled that an injunction to restrain the collection of taxes is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief, or, in the language of the statute, when an adequate remedy can not be afforded by an action for damages. It is unnecessary to cite the numerous authorities in England, and

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

other States, and I will only refer to the following from our own reports: Dean v. Todd, 22 Mo. 90; Sayre v. Tompkins, 23 Mo. 43; Lockwood v. St. Louis, 24 Mo. 20; State v. P. G. R. R.R. Co., 32 Mo. 496. There are no circumstances of peculiar hardship attending this threatened sale. But, second, the plaintiff has no equity, for the reason that its property is not in jeopardy. The bank, as a corporation, will lose nothing if the shares of its stockholders are sold. The shareholders are the ones who suffer; and they, if any one, are entitled to relief. The demurrer to the petition should have been sustained, and for overruling it the Court of Common Pleas committed an error.

The judgment of the District Court and Court of Common Pleas is reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* NORTH MISSOURI CENTRAL RAILROAD COMPANY, Relator, *v.* THE LINN COUNTY COURT, Respondent.

1. *Contracts — Township — Power of, to make — Legislature* — Townships have no power by themselves to make independent contracts or to become bound in their separate capacity, and the law has not invested them with that power. But there is nothing to prevent the Legislature from doing so should it see fit.
2. *Railroads — Railroad act of 1863 — County bonds — Constitution.* — Bonds issued by a township under the act to facilitate the construction of railroads in Missouri (Sess. Acts 1863, p. 92), are not in any sense county bonds; and the County Courts and counties named are merely made use of as agencies to carry out the object contemplated by the act. Hence, that act is not antagonistic to section 14, art. XI, of the State constitution.
3. *Revenue — Taxes and subscriptions by municipal corporations — Legislature — Powers of.* — The law is now well settled in the United States, that the Legislature, having the control of the municipal organizations, and the power to enlarge or abridge their powers at pleasure, may make them the instruments in carrying out works of public improvement, and may authorize them to make the subscription and levy taxes and issue bonds to meet the assessments thereon. The new constitution has not abridged this power. It only requires a different mode of procedure, and the assent of two-thirds of the qualified voters before a subscription shall be authorized.
4. *Revenue — Taxation, under act for constructing railroads in Missouri — Assessment for benefits — Constitution.* — The provision in the act to facilitate

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

the construction of railroads in Missouri (Sess. Acts 1868, p. 92, § 2), requiring that the taxes for the payment of bonds issued for that purpose shall be based exclusively on real estate, is more in the nature of an assessment for benefits than general taxation. The lands are adjudged to be benefited by the improvements and are taxed in proportion to the amount of such benefit, and the whole tax and expense is levied upon them. And the principle applies in its fullest extent to railroads. Section 16, art. XI, of the constitution, against exempting property from taxation, has reference only to ordinary and general taxation for the purposes of revenue; and assessments of taxes under section 2 of the above act are not such taxations as is contemplated by the general terms of the constitution.

Petition for mandamus.

Burgess, and Mullens, for relator.

I. Bonds issued under the act of March 23, 1868, (Sess. Acts 1868, p. 92,) are not the bonds of the county, but are the bonds of the township; and, although the act requires them to be issued in the name of the county, the township alone is responsible for their payment. (*Briscoe v. Bank of the Com. of Ky.*, 11 Pet. 257; *Hodges v. Runyan*, 30 Mo. 491; *Tutt v. Hobbs*, 17 Mo. 488; *Angell & Ames on Corp.* §§ 276, 278.) There is nothing in the constitution of the State of Missouri which prohibits the General Assembly from authorizing townships to subscribe stock to railroad companies in the manner prescribed by the act of March 23, 1868; and, in the absence of such prohibition, the Legislature has that power. (*Cincinnati, Wilmington & Zanesville R.R. Co. v. The Commissioners of Clinton County*, 1 Ohio St. 77; *The Steubenville & Indiana R.R. Co. v. The Trustees of North Township, Harrison Co.*, 1 Ohio St. 105.) The county of Linn is a municipal corporation. (2 Kent's Com. 275; *Ang. & Ames on Corp.* §§ 9, 29; 2 Bouv. Law Dict. 201; *Coles v. Madison County*, 1 Breese, 154.) And the act of the General Assembly makes the townships corporations with such powers only as are necessary to enable them to carry into effect the objects contemplated by the act; and the duty enjoined upon the county courts is that of special agents in behalf of the townships. (*Ang. & Ames on Corp.* §§ 23, 24, 276, 278, and authorities hereinbefore referred to.)

II. The act of the General Assembly in question is not

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

invalid for the reason that taxation, to pay the subscriptions authorized by the act, or the bonds issued in payment thereof, is limited to the real estate. The Legislature was the sole judge of the propriety of this action. (*Glasgow v. Rowse*, 43 Mo. 479; *The People v. The Mayor of Brooklyn*, 4 Comst. 419, 430, 431, 438, and cases there cited; *Sedgwick on Stat. and Const. Law*, 502-3, 554, 557; *Cooley's Const. Lim.* 506, and cases cited.)

III. Unless there is an express constitutional prohibition, municipal corporations, when acting by legislative authority, are authorized to subscribe to the stock of railroad companies, issue bonds, and levy taxes to pay the same. (*Pierce on Am. R.R. Law*, 114-15; *Sedg. on Stat. and Const. Law*, 463-4.)

Easley, for respondent.

I. The act of March 23, 1868 (Sess. Acts 1868, p. 92), is unconstitutional, because the bonds which it is sought to compel respondent to issue, under the provisions of said act, would be an indebtedness to the county of Linn, and not to the township of Benton, for these reasons: 1. The township has no authority to make the bonds. 2. The township is not a corporation, nor even a *quasi* corporation, nor does the said act make the township like a corporation for any purpose whatever, even by implication. 3. The act expressly provides that the bonds shall be issued "in the name of the county." 4. The County Court is the agent of the county, and not the agent of the township. (Const. of Mo., art. XI, § 14.)

II. The said act of March 23, 1868, is unconstitutional, because it is therein provided that real estate only shall be taxed for the payment of the bonds issued under it, thus exempting all other species of property. (Const. of Mo., art. XI, § 16.) It can not be urged that the assessments required to be made under this act are not "taxation," within the meaning of the constitutional prohibition. The only authority of the Legislature to require public improvements, like railroads, to be made at the public expense, is based on their general taxation powers. (*Sharpless v. Mayor, etc., of Philadelphia*, 21 Pa., 147, and the authorities cited.)

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

WAGNER, Judge, delivered the opinion of the court.

The relator asks this court to grant a peremptory writ of *mandamus* against the respondent; and states, substantially, that on the 18th day of May, 1869, at a term of the County Court, in and for the county of Linn, in the State of Missouri, a petition signed by twenty-five (and more) persons, tax payers and residents in the municipal township of Benton, in said county, setting forth their desire, as a township, to subscribe twenty thousand dollars to the capital stock of the North Missouri Central Railroad Company, which road was proposed to be constructed through the said township. The petition stated the terms and conditions on which the petitioners desired the subscription should be made. It is further alleged that on the said 18th day of May, 1869, the County Court made, and caused to be entered on the record of its proceedings, an order for an election as prayed for in the petition, which order is set out at length; that in pursuance of said order, an election was duly held, conducted as prescribed by law, and that more than two-thirds of the qualified voters of the township voting at the election, voted in favor of the subscription; that at an adjourned term of the court, held on the 5th day of July, 1869, the court made an order of record, making the subscription in behalf of the said Benton township according to the terms and conditions as set forth in the petition for the election and the order of the court calling the same; that afterwards, at the August adjourned term of said court, held on the 6th day of September, 1869, the North Missouri Central Railroad Company requested the court to issue and deliver to said company the bonds required under the terms and conditions of said subscription; but the court refused, and still refuses, to deliver the bonds, for the alleged reason, only, that the act under which the subscription was made was unconstitutional and void.

The return admits all the facts stated in the petition; that all the proceedings were regularly had, and that the court made the subscription, but denies that the relator is entitled to the bonds; avers that the court ought not to issue and deliver them, because

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

the law under which they acted is violative of the State constitution, and should therefore be regarded as a nullity. The authority for counties to subscribe in behalf of townships and under which the proceedings in this case were had, is derived from an act of the Legislature, approved March 3, 1868. (Sess. Acts 1868, p. 92.) The act is entitled "An act to facilitate the construction of railroads in the State of Missouri." The first section provides that whenever twenty-five persons, tax-payers and residents, in any municipal township, for election purposes, in any county in this State, shall petition the County Court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through, or near such county, and stating the amount of such subscription, and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the County Court, as soon as may be thereafter, to order an election, to be held in such township, to determine if such subscription shall be made, which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear, from the returns of such elections, that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the County Court to make such subscription in behalf of such township, according to the terms and conditions thereof; and if such conditions provide for the issue of bonds in payment of such subscription, the County Court shall issue such bonds in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent. per annum; and the same shall be delivered to the railroad company. By section 2 it is provided that in order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest or principal on any bond which may be issued on account of such subscription, the County Court shall, from time to time, levy and cause to be collected, in the same manner as county tax, a special tax, which shall be levied on the real estate lying within the township

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

making the subscription, in accordance with the valuation then last made by the county assessor for county purposes.

The third section authorizes and requires the county treasurer to receive and collect of the sheriff of the county the income from the tax provided in the previous section, and to apply the same in payment of the stock subscription, according to its terms, or to the payment of interest and principal on the bonds, should any be issued in payment of such subscriptions. It requires him also to pay all interest on such bonds, out of any money in the treasury collected for that purpose, by the tax so levied, as the same becomes due, and also the bonds as they mature, which shall be canceled by the County Court. The fourth section makes provision that persons paying taxes to pay the stock subscriptions made in accordance with the act, shall receive from the collector a certificate setting forth in a definite manner the facts, and such certificates, in sums of one hundred dollars, shall be convertible into the stock of the railroad company receiving the subscription, and the County Court is required to hold the stock subscribed in behalf of any township in trust for such taxpayers, to be transferred as they become entitled to it. It is now contended that the act is unconstitutional, because the bonds which it is sought to compel respondent to issue under the provisions of the act would be an indebtedness of the county, and not of the township, and that it is therefore in direct antagonism with section 14, article XI, of the State constitution, which declares: "The General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." It is further insisted that the act is unconstitutional, for the reason that, in providing for the payment of the principal and interest on such bonds as may be issued, it requires that real estate only shall be taxed, thereby exempting all other species of property, for which reason it is in violation of the sixteenth section of the eleventh article of the constitution, which says: "No property, real or personal, shall be exempt from such taxation, except such as may be

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." As to the first ground, that the township is not a corporation, nor even a *quasi* corporation, and has no authority to make the bonds, and that, consequently, they would be the bonds of Linn county, I do not think the objection is insuperable. The township is a legal subdivision of the county—is an organization for certain municipal purposes—but it has no power by itself to make independent contracts, or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county, to a certain extent, controls and acts for it. In some of the States, townships act independently, through trustees, and are capable of making valid and binding contracts; but our law has not given them that authority. I know of nothing, however, to prevent it, should the Legislature see fit to do so. But the plain provisions of the act which governs this case entirely negative the assumption that the bonds would, in any event or contingency, be the bonds of the county. It is true the County Court is made the medium through which the bonds are to be issued, and they are to be issued in the name of the county. This is done, I suppose, because the townships have no distinct and independent political organization. But still the law requires that the subscription shall be made by the court, in behalf of the township; and it provides for the payment of interest and principal by the township exclusively. The mode of subjecting the property in the townships made liable for the payment of the tax is clearly pointed out. The collector is empowered to collect the special tax and pay it over to the treasurer, whose duty it is to keep it separately, and to apply it to the payment of the stock subscription, according to its terms, or to the payment of the interest and principal, as the case may be, but in no event does it become a charge on the county. The bonds are not, therefore, in any sense county bonds. The subscriptions are essentially township subscriptions, and the bonds are, to all intents and purposes, township bonds, and the County Courts and the counties named are merely made use of as agencies to effectuate and carry out the

State of Mo. ex rel. N. M. Cent. R.R. Co. v. Linn Co. Court.

object. The law is now well settled in the United States that the Legislature, having control of the subordinate municipal organizations, and the power to enlarge or abridge their powers at pleasure, may make them the instruments in carrying out works of public improvement, and may authorize them to make the subscription and to levy taxes and issue the bonds to meet the assessments thereon. Such is now the universal current of decisions, and the question has not been opened to dispute in this State since the case of the City and County of St. Louis v. Alexander, 23 Mo. 483. The new constitution has not abridged this power. It only requires a different mode of procedure, and that two-thirds of the qualified voters shall assent thereto before any subscription shall be authorized to be made. The next point to be considered is whether the law is liable to the objection that it violates the constitution, which declares that "no property, real or personal, shall be exempt from taxation," etc. The provision in the law requiring that the taxes should be based exclusively on real property, is more in the nature of assessments for benefits than general taxation. It is a common mode and the general practice, when authorizing local improvements to be made, to cause the expense to be assessed upon the owners of real estate in the immediate vicinity of the improvements, on the ground that such real estate will be immediately and principally benefited thereby. The lands are adjudged to be benefited by the improvements, and are taxed in proportion to the amount of such benefit, and the whole tax and expense is levied upon them. The construction of a railroad through a township is calculated to permanently increase and enhance the value of all the lands in that township, and hence the principle applies in the fullest extent. It is the land which derives the permanent advantage, while personal property may not be affected. Although the law in this instance does not contemplate that the taxes assessed shall be a gratuity, and that the persons paying shall receive no other consideration than the supposed benefits to their property—for provision is made by which they ultimately become shareholders in the company to the amount of payments—still the payment is an enforced burden, an exercise of the taxing power.

Magwire v. Riffin.

It is obvious that the section in the constitution against exempting property from taxation had reference only to ordinary or general taxation for the purposes of revenue, and that assessments of the character involved in this case is not such taxation as is contemplated by the general terms which the constitution employs. The County Court having made the subscription, the company is entitled to the bonds. (State *ex rel.*, etc., v. Macon County Court, 41 Mo. 465.)

Peremptory *mandamus* ordered; the other judges concurring.

JOHN MAGWIRE, Appellant, v. JOHN RIGGIN, Respondent.

1. *Covenant — Indemnity.*—The words “grant, bargain, and sell,” contained in the statute (Gen. Stat. 1865, ch. 109, § 8), are a covenant that runs with the land, of indemnity, continuing to successive grantees, and insuring to the one upon whom the loss falls.
2. *Dower — Eviction — Covenant of seizin — Suit on.*—The satisfaction of a judgment in proceedings to enforce the assignment of dower in certain land, held by the grantee under a covenant of seizin, is equivalent to an eviction for the purposes of a suit by him against the grantee on the covenant.
3. *Dower, prior to admeasurement, not subject of grant or assignment.*—A dowress, until her dower is set off, has no property in the land, which is the subject of grant or assignment.
4. *Conveyances — Covenants — Demands based on, should depend on subsisting estate.*—A demand arising from the covenants of a conveyance should depend upon some subsisting estate that would ripen into a right of possession and be made to operate an eviction unless discharged.
5. *Dower — Inchoate right of — Not a “contingent demand” under bankrupt act of 1841.*—A demand against a bankrupt by his grantee or assignee, upon a covenant of seizin in the conveyance, founded upon a possible claim for dower in the land conveyed, is not such a “contingent demand” as could have been exhibited against the estate of a bankrupt, under the act of 1841 (Bankrupt law of 1841, § 5), and is not barred by discharge of the bankrupt for non-presentment prior thereto.

Appeal from St. Louis Circuit Court.

Harding & Crane, for appellant.

I. The covenant of indefeasible seizin, created by the statute, is a covenant for title, and runs with the land. (Dickson v. Desire, 23 Mo. 151; Chambers v. Smith, 23 Mo. 174.)

Magwire v. Riffin.

II. The covenant sued upon being one which runs with the land, and not broken until after defendant's act and discharge in bankruptcy, that discharge does not release defendant from liability to plaintiff in this action. (French v. Morse, 2 Gray, 111; Bush v. Cooper, 26 Miss. 612; 5 U. S. Stat. at Large, 444; Bennett v. Bartlett, 6 Cush. 225; Rawle on Cov., 3d ed., 577.) Uncertain or contingent demands were provable under the act of 1841, but the claim of Magwire in this case is not such a demand; but, at the time of defendant's discharge in bankruptcy, it was a contingency whether there would ever be a demand. (*Vide* Reed v. Pierce, 36 Maine, 460; Bush v. Cooper, 26 Miss. 612; Woodard v. Herbert, 24 Me. 358; Goodwin v. Stark, 15 N. H. 218; 3 Pars. Cont., 5th ed., 505, note *f*; James' Bankr. Law, 84-6; Bennett v. Bartlett, 6 Cush. 225; French v. Morse, 2 Gray, 111; 1 Smith's Lead. Cas., 6th ed., part 2, pp. 1135, 1137, 1139.) The discharge of the principal in a penal or official bond in bankruptcy is no bar for after breaches, because the pecuniary obligation imposed by these instruments depends on a contingency which can not be estimated. (Woodard v. Herbert, 24 Me. 358; Goodwin v. Stark, 15 N. H. 218; Dyer v. Cleveland, 18 Verm. 241; Ellis v. Ham, 28 Mo. 385; Goss v. Gibson, 8 Humph. 107; Loring v. Kendall, 1 Gray, 305; Dale v. Warner, 32 Mo. 94; French v. Morse, 2 Gray, 111, 113.) The case at bar is clearly distinguishable from the case of Shelton v. Pease, 10 Mo. 475. The latter is a case of a contingent demand.

Garesche & Mead, for respondent, relied on Shelton v. Pease, 10 Mo. 475.

BLISS, Judge, delivered the opinion of the court.

In 1839 the defendant conveyed certain lands to plaintiff's grantor by a deed containing the statutory words, "grant, bargain, and sell," without being restrained by other express terms (Gen. Stat. 1865, ch. 109, § 8), and in 1843 obtained a certificate of discharge in bankruptcy, under the act of 1841. In 1868, one Margaret Thomas obtained a judgment in proceedings

Magwire v. Riffin.

for the assignment of dower upon this land, her inchoate title having commenced anterior to that of defendant, as conveyed in his deed of 1839. This suit was instituted by the plaintiff upon the covenants of said deed to his grantor, and the defendant pleads his certificate of discharge in bankruptcy.

The words "grant, bargain, and sell" contain, by the statute, the express covenant of indefeasible seizin in fee simple of the land conveyed, and are a covenant that runs with the land, of indemnity, continuing to successive grantees, and inuring to the one upon whom the loss falls. (*Dickson v. Desire's Adm'r*, 23 Mo. 151.) No right of action arises upon this covenant until the assertion of the paramount title, and in the present case the plaintiff and his grantor enjoyed peaceable possession until the assertion by Margaret Thomas of her right of dower by her proceedings to enforce it, and for the purposes of this action the satisfaction of her judgment was equivalent to an eviction. This right to avail himself of defendant's covenant, having arisen so many years after his discharge from bankruptcy, he is met by the claim that this covenant is one of the "contingent demands" embraced in that discharge.

The language of the bankrupt act of 1841, in relation to the character of the indebtedness brought within its operation, is very broad. The fourth section provides that "a discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall and may be pleaded as a full and complete bar," etc.; and section 5 provides that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indosers, bail, or other persons having uncertain or contingent demands against such bankrupt shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts or claims become absolute, to have the same allowed them." By these two provisions, all contingent demands that are provable under the act are entitled to a share of the bankrupt's effects, and are barred

Magwire v. Riggin.

by his discharge. The demand of plaintiff's grantor at the time of the proceedings in bankruptcy were found upon Mrs. Thomas' inchoate right of dower in the premises granted, her husband being then living. This right is not an estate, but a mere contingent claim, not capable of sale on execution, nor the subject of grant or assignment. (Moore v. Mayor, etc., 8 N. Y. 110.) It may be divested without the consent of the widow by taking the land for public use. (*Id.*) The dowress has a contingent possibility of interest in the premises which may be released, but no property, no actual interest, in it which is the subject of grant or assignment. Nor is the value of her possible or contingent interest capable of estimate with any degree of accuracy. (Weaver v. Gregg, 6 Ohio St. 547.) She may be divested of it by sale in partition. (*Id.*) She may relinquish to the person holding the next estate, but can not sell and assign until dower is set off. (Miller's Adm'r v. Woodman, 14 Ohio, 518; Waller v. Mardus, 29 Mo. 25.)

Can a demand, founded upon the fear of the ripening and enforcement of such a shadow of a title, be presented to the bankrupt's assignee and liquidated by him? Is it one of those "uncertain and contingent demands" contemplated in the act? If so, a large portion of one's business transactions involves such demands. Every deed of conveyance in the ordinary form contains the covenant of indefeasible seizin; and who knows the encumbrances that, at some future day, may possibly be developed? One who had made numerous conveyances might find some difficulty in ascertaining the number of possible claims to be inventoried, the time they might possibly ripen, or the persons to whom they may possibly accrue. All these possible claimants should have their demands allowed, and distribution should be suspended until every possibility is excluded by time; and the time involved is well illustrated by the twenty-five years from discharge before the present claim matured. If distribution be not thus suspended, there is no sense in proving up such a claim; and if it be suspended, the act of 1841 was a greater calamity to *bona fide* creditors than was ever charged by its enemies. An interpretation that

involves such results should not be given unless imperatively required.

The contingency should not depend upon a contingency, but the subject matter should be tangible and capable of computation, in order to be taken into account in apportioning the bankrupt's estate. The demand, if arising from the covenants of a conveyance, should depend upon some subsisting estate that would ripen into a right of possession and be made to operate an eviction unless discharged. A condition or relation that depends upon several contingencies before it can ripen into an estate even, is altogether too remote a contingency to be a subject of computation. The Supreme Court of Massachusetts, in discussing this subject, says, that "in the bankrupt act uncertain or contingent demands should be held to mean, not demands whose existence depend on a contingency, but existing demands upon which the cause of action depends on a contingency." (*French v. Morse*, 2 Gray, 114.) In *Woodard v. Herbert*, 24 Maine, 362-3, the court pertinently remarks: "It is necessary to distinguish between a contingent demand and a contingency whether there ever will be a demand;" and further, "the contingent or uncertain demands, provided for in the act of Congress, are those contingent demands which were in existence as such, and in such a condition that their value could be estimated at the time when the party was deemed to be a bankrupt." In that case the defendant was surety upon a bail bond for one arrested upon *mesne* process, and the liability did not accrue until after defendant's discharge in bankruptcy. The definition of contingent demands thus given by the Supreme Courts of Massachusetts and Maine would not only exclude from the operation of a discharge, under the bankrupt act of 1841, claims like the one involved in this suit, but all demands founded upon encumbrances—where the covenant runs with the land—that had not been made to operate an eviction or to compel satisfaction until after the discharge. In support of the above cases see *Reed v. Pierce*, 36 Me. 455; *Goodwin v. Stark*, 15 N. H. 218; *Bush v. Cooper*, 26 Miss. 599; *Burns et al. v. Wilkinson*, 31 Miss. 537.

Sureties upon a money bond or note, whether due or not at the

Magwire v. Riffin.

time of discharge, can not recover of the principal who has received such discharge, although the obligation be paid by them, and the cause of action arose after the proceedings in bankruptcy. The contrary had been held; but the doctrine was settled by *Mace v. Wells*, 7 How. 272, and adopted in *Craft v. Mott*, 4 N. Y. 603. But the reason expressly given for this holding was the opportunity had by the surety to come in and prove up his demand.

But the authorities are not uniform in relation to the liability of a bankrupt upon his covenants in a conveyance, when the breach did not arise until after discharge. In *Jamison v. Blowers*, 5 Barb. 686, and in *Shelton v. Pease*, 10 Mo. 475, such discharge is held to be a bar to an action upon such covenants. Both were cases where the land was encumbered by mortgages at the time of the conveyance, and where the mortgage was foreclosed or discharged after the bankrupt certificate was obtained. If the case of *Shelton v. Pease* embodied a state of facts like those of the one at bar, I should regard it as an authority entitled to the greatest weight, if not wholly controlling our opinion, especially in view of the learning and consideration brought to bear upon the opinions of those who decided that case. But the case did not go off upon that question, and besides, an encumbrance created by deed differs very materially from a liability for dower during the life of the husband. The presentation and allowance of a demand based upon the former, before the mortgage is foreclosed or discharged, is admitted to be difficult; how utterly impossible upon the latter. In the one case the encumbrance is certain, and the only doubt is whether it will ever be enforced; in the other it is matter of doubt whether it will ever exist, and the contingencies are so many that the probabilities against its existence strongly preponderate.

We hold, then, that a demand against a bankrupt, by his grantee or assignee, upon the covenant of seizin in the conveyance, founded upon a possible claim for dower in the land conveyed—the husband of the dowress being alive, or, from some other cause, the claim not being presented until after discharge—is not such a “contingent demand” as could have been exhibited against

Merry et al. v. Fremon et al.

the estate of the bankrupt, and is not barred by his discharge in bankruptcy.

The judgment of the court, at general term, reversing that of the special term, is reversed and the cause remanded. The other judges concur.

JAMES MERRY and JOHN GLENNY, Appellants, *v.* ADELE B. FREMON *et al.*, Respondents.

1. *Chancery—Fraudulent conveyances.*—It is necessary to exhaust all legal remedies before applying for the assistance of a court of chancery. In exhausting the legal remedies a lien may be created upon property sought to be charged, but a lien is not necessary in order to obtain the assistance of a court of chancery. A lien is the incident, but not the object, of the proceedings. It is generally necessary to show the issuance of an execution and a return of *nulla bona*, but it may be dispensed with where it is shown that the debtor was insolvent.
2. *Probate Court—Fraudulent conveyances.*—The Probate Court has no power to set aside a conveyance of deceased on the ground of fraud.
3. *Administrator—Fraudulent conveyances.*—A conveyance can not be impeached by the administrator of the grantor as being fraudulent on the part of the grantor.
4. *Administrator—Fraud—Parties.*—An administrator is not a proper party to a suit to set aside a conveyance of the deceased as being a fraudulent act of the deceased.

Appeal from St. Louis Circuit Court.

Lighthizer, and Smolley, for appellants.

I. The Probate Court of St. Louis has no equitable jurisdiction. The premises conveyed by trustee Dick to LeBeaume, however fraudulent the deed, formed no part of C. Zelina Fremon's estate at the time of her death, nor had the Probate Court any jurisdiction over them. (*George v. Williamson*, 26 Mo. 193; *McLaughlin v. McLaughlin*, 16 Mo. 242.) To perfect the right of creditors to set a deed aside, they must first exhaust the personal estate. (*Bird v. Boldue*, 1 Mo. 701; *Moffit v. Ingham*, 7 Dana, 495.)

II. The administrator of C. Zelina Fremon could not under-

Merry et al. v. Fremon et al.

take to set aside the deed in question. The conveyance, however fraudulent and void as to her creditors, was valid and binding as against her and her heirs. (George v. Williamson, *supra*; McLaughlin v. McLaughlin, *supra*; 7 Johns. 160.)

III. Appellants are entitled to have the colorable title, under the fraudulent conveyance to the respondent LeBeaume, set aside by a decree of a court of competent jurisdiction in an equitable proceeding. (Lillard v. McGee, 4 Bibb, Ky., 165.)

Garesche, and Bakewell & Farish, for respondents.

I. The Circuit Court had no jurisdiction to grant the relief sought. No order of sale or execution against the estate of a deceased person can issue from that court; the Probate Court alone has such authority.

II. As an application for a *scire facias*, to revive the lien of a judgment, the petition was defective in not making the administrator of Zelina Fremon a party. (Gen. Stat. 1865, p. 637, § 15.)

III. As a bill in equity, to set aside a conveyance for fraud, the bill was defective in this, that it showed that the lien of appellants' judgment had expired, and they were in no position to invoke a court of equity to set aside the conveyance.

CURRIER, Judge, delivered the opinion of the court.

This is a petition in equity filed by the plaintiffs, who are creditors of C. Zelina Fremon, deceased, against Louis A. LeBeaume, trustee of said deceased, and also of her children, who are joined with said LeBeaume as co-defendants. The object of the petition is to subject certain real estate described therein to the payment of the indebtedness of said C. Zelina Fremon to the plaintiffs, said indebtedness having been reduced to judgment in the lifetime of said Fremon. This judgment was duly allowed and classed by the Probate Court as a claim against her estate. The petition charges that said real estate was acquired with the funds of said deceased, and that the title thereto was, in fraud of the rights of her creditors, vested in said LeBeaume in trust

Merry et al. v. Fremon et al.

for her use while she should live, and after that for the use and benefit of her said children. The petition also shows that her estate proved insolvent, and that all the assets which came to the hands of the administrator have been fully administered upon; that the administration has been closed, leaving a balance of \$702.21 due the plaintiffs on the said claim, classed and allowed as aforesaid.

The original judgment in favor of the plaintiffs was rendered in the month of April, 1863. The present suit was commenced October, 1868. The petition is demurred to mainly on the alleged ground that it does not state facts sufficient to constitute a cause of action, or to warrant the relief prayed for. It is supposed to be defective in this particular, because it shows upon its face that the lien of the plaintiffs' original judgment has expired. This objection appears to be based upon the idea that the real estate in question can not be subjected to the plaintiffs' claim, or to judgment in a chancery proceeding, without the basis of a legal lien to found the proceedings upon; or, to state the proposition in more general terms, it would seem to be the view of the defendants' counsel that a creditor, before he can rightfully question in chancery the propriety of the disposition which his debtor may have made of his property, must first fasten and maintain upon such property a valid lien at law.

It is doubtless true that the creditor in this class of cases, before resorting to chancery, must first exhaust his legal remedies, whatever they may be. In doing so he may create a lien upon the property sought to be subjected. The creation of such lien is, perhaps, an ordinary incident to such preliminary proceedings at law. But the lien is the incident, and not the object, of the proceedings. The object is, in the first place, by judgment, to reduce the creditor's claim to certainty—to show that he is in fact a creditor. Unless the party shows that, he has no concern with his debtor's supposed frauds. It is therefore necessary for a party claiming to be a creditor, to show by appropriate proceedings at law that he is in fact so, before a court of chancery will, at his instance, enter into an investigation of acts and transactions alleged to be fraudulent as to

Merry et al. v. Fremon et al.

creditors. Nor will a court of chancery interfere except in the last resort, when it is shown that the creditor has exhausted his legal remedies. It is therefore usually necessary for the creditor not only to reduce his claim to judgment, but to seek the enforcement of such judgments by execution. Ordinarily, therefore, the creditor must show the issuance of an execution and its return *nulla bona*. That is the proper evidence of the debtor's insolvency and of the creditor's inability to make his money by legal process. When the creditor has obtained his judgment and sought thus ineffectually to enforce it, he is in a position to appeal to a court of chancery to remove obstacles which may have defeated a collection at law, and for such aid as may be appropriate to the circumstances of the case. It is not necessary, however, that he should show the existence of a lien upon the property proposed to be charged, although such lien may ordinarily exist, in such cases, as an incident to the judgment. The lien of the judgment is created and regulated by statute. Were the statute giving the lien repealed, that would not affect the right of the creditor to have his judgment satisfied out of the debtor's property, or out of the property which the debtor may have fraudulently conveyed. If a lien were necessary in all cases as a foundation for proceedings in equity, creditors would be without remedy where their debtor should fraudulently convey his property, and then die before judgment could be had against him. Such a result would be monstrous.

The essential condition to proceedings in equity, in these cases of fraudulent conveyances, is that the creditor shall first apply and use his legal remedies; and this does not necessarily involve the issuing of an execution, as where the judgment is against an insolvent estate. (*McDowell v. Cochran*, 11 Ill. 31; also, 21 Ill. 337.) It has also been held that where it is shown that the debtor was insolvent, and that the issue of an execution would necessarily be of no practical utility, its issue might be dispensed with. (*Postlewait v. Howes*, 3 Clark, Iowa, 366.)

In the case at bar the indebtedness is established by the judgment of the Probate Court, allowing the plaintiff's original judgment as a subsisting claim against said deceased's estate. The

Merry et al. v. Fremon et al.

first judgment was merged in the second, and would not therefore seem to be of any continuing importance. The fraud charged in the petition is admitted by the demurrer. The estate of the deceased proved insolvent, and the creditors made all out of it which they could secure in that direction. In a word, they fully applied and exhausted their legal remedies. The Probate Court could grant no relief. It had no jurisdiction of the fraud. (26 Mo. 190.) Nor could the fraudulent conveyance be impeached by the administrator. He was bound by the acts of the deceased, as were also her heirs. (McLaughlin v. McLaughlin, 16 Mo. 242; George v. Williamson, 26 Mo. 190.)

The plaintiffs are, therefore, without remedy, except in this form; and, as they have exhausted all legal modes of redress, justice must be administered by calling into exercise the powers of the court of chancery. (See Potts v. Blackwell, 3 Jones' Eq., N. C., 449; State Bank v. Ellis, 30 Ala. 478; Quarles v. Grigsby, 31 Ala. 172; Greenway v. Thomas, 14 Ill. 271.)

All the parties interested in the real estate in question appear to be before the court. The estate of the deceased, subject to administration, has been fully administered, and the trust of the administrator terminated. There would not, therefore, seem to be any administrator to join in the suit. But if there were, to what end should he be made a party? He has no interest in the matter, and, as we have seen, is not permitted to contest the validity of the transaction charged with the alleged fraud.

All persons interested in the subject of the litigation are joined and brought in, and that would seem to be sufficient. It is purely a controversy between them and the plaintiffs, and not between the plaintiffs and the administrator.

The judgment of the Circuit Court, for these reasons, is reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. WILLIAM MATHEWS,
Appellant.

1. *Insurance companies — Act of March 10, 1869 — Information touching business of companies, failure to give — Penalty for.*—The *qui tam* action provided by section 43 of the act of March 10, 1869, for the incorporation of insurance companies, etc. (Sess. Acts 1869, p. 60), for violation of the act by such companies, is not exclusive. That section refers generally to all violations of the act. But when parties fail to comply with or violate section 13 of the act "to create an insurance department" (Sess. Acts 1869, p. 23), requiring insurance companies to give information to the State superintendent of insurance touching their business, they are liable to be proceeded against for misdemeanor, under that section.
2. *Insurance companies — Act of March 4, 1869 — Title of statute — Constitution.*—Section 13 of the act entitled "An act to create an insurance department" (Sess. Acts, 1869, p. 23), in substance, required insurance companies, on demand, to give the State superintendent of insurance, information touching their business, and, for failure to furnish the same, made the party offending guilty of misdemeanor, and subject to fine and imprisonment. *Held*, that the said section was not in violation of section 32, art. IV, of the State constitution as relating to a subject not included in the title of the act. It was necessary, in order to carry out the act, to empower the superintendent to obtain such information; but the power would have been fruitless without the authority to enforce it.
3. *Constitution — Section 32, art. IV. — Intention of.*—Section 32, art. IV, of the State constitution was intended to effectually inhibit the putting of diverse subjects in the same bill.
4. *Insurance companies — Act of March 10, 1869 — Title of — What companies embraced in.*—An act entitled "An act for the incorporation of insurance companies and other than life insurance companies, and for the regulation of insurance business, other than life assurance business" (Sess. Acts 1869, p. 45), comprehends fire and marine insurance companies.
5. *Insurance companies — Act of March 4, 1869 — U. S. constitution — Contracts — Impairing obligation of.*—A fire and marine insurance company was chartered prior to the passage of the act of March 4, 1869, "to create an insurance department." *Held*, that section 13 of that act requiring insurance companies, on demand, to furnish the State superintendent of insurance with information touching their business was not in violation of the constitution of the United States, as impairing the obligation of the contract between the State and the company, arising from the charter. Corporations, like natural persons, are subject to those laws which the State may prescribe for the good government and regulation of the community, and the protection of the citizen. The power of the State to prescribe such laws is inherent in every sovereignty, and can not be surrendered even in the granting of a charter.

The State of Missouri v. Mathews.

Appeal from St. Louis Court of Criminal Correction.

Hill & Jewett, for appellant.

Johnson, Attorney-General, and *Hitchcock & Lubke*, for respondent.

I. The act of March 10, 1869 (Sess. Acts 1869, p. 45), does not relate to more than one subject, and that subject is properly expressed in the title. (*City of St. Louis v. Tiefel*, 42 Mo. 578; *People v. Mahoney*, 13 Mich. 495; *Davis v. Bank of Fulton*, 31 Ga. 69; *McAunich v. Mississippi R.R. Co.*, 20 Iowa, 338; *Robinson v. Skipworth*, 23 Ind. 311; *O'Leary v. Cook*, 28 Ill. 534; *People v. Lawrence*, 36 Barb. 177; *Johnson v. Higgins*, 3 Metc., Ky., 556.)

II. It does not impair the obligation of a contract. (*Bank of Columbia v. Attorney-General*, 3 Wend. 588; *Commonwealth v. Farmers' & Mechanics' Bank*, 21 Pick. 542; *Gorman v. Pacific R.R. Co.*, 26 Mo. 441; *Thorpe v. The Rutland R.R. Co.*, 1 Will. 141; *Lyman v. Boston & W. R.R. Co.*, 4 Cush. 288; *Norris v. The Androscoggin R.R. Co.*, 39 Me. 275; *New Albany & Salem R.R. Co. v. Tilton*, 12 Ind. 3; *Illinois Central R.R. Co. v. Swearingen*, 33 Ill. 289.)

III. The remedy given by section 43 of said act is not exclusive of the ordinary remedy, by information or indictment, for misdemeanors committed by violations of the provisions thereof.

WAGNER, Judge, delivered the opinion of the court.

The defendant, who is president of the Excelsior Insurance Company, was prosecuted and convicted in the Court of Criminal Correction for a violation of the insurance laws of this State. It is agreed that the Excelsior Insurance Company is a company for insuring fire and marine risks, and was chartered by the Legislature several years prior to the passage of the general insurance law now in force, and that the act of incorporation exempted it from the operation of the statutes of 1855, subjecting corporate charters to legislative repeal, alteration, or amendment. The prosecution was commenced under the thirteenth section of the act

"to create an insurance department," and which gives the superintendent power to investigate and inquire into the business of insurance transacted in this State, and which declares that any person who shall refuse to give the necessary and requisite information when thereto demanded, shall be guilty of a misdemeanor, and be subjected to a fine and imprisonment. Under the division in the law, entitled "an act for the incorporation of insurance companies other than life assurance companies, and for the regulation of insurance business other than life assurance business," the twenty-third section makes it the duty of the president, or vice-president and secretary, or a majority of the directors, of every insurance company organized under the act or laws of this State, to make a report of its condition to the superintendent, within a given time. The section specifies particularly what the report and statement shall contain. The forty-seventh section requires every company organized by or incorporated under the laws of this State, to file the first statement, as mentioned in the twenty-third section, with the superintendent within ninety days after the passage of the act. The defendant refused to make and file the statement or give the required information. Before disposing of the main issues which arise in this cause, I will notice a preliminary point which has been pressed upon our attention, and that is whether this proceeding is not misconceived, and whether an information will lie. The forty-third section of the act last referred to provides that every violation of the act shall subject the party violating to a penalty of five hundred dollars, which shall be sued for and recovered in the name of the State of Missouri, by the attorney-general of the State, or circuit attorney of the circuit in which the company or agent, or agents, so violating shall be situated; and one-half of such penalty, when recovered, shall be paid into the treasury of the State, and the other half to the informer of such violation. It is insisted that this remedy is exclusive, and the only remedy that can be resorted to for a violation of the law. But this position is clearly untenable. The section refers to all violations of this act, and not particularly to the especial provisions we are now considering. The act "to create an insurance department" defines the duties

The State of Missouri v. Mathews.

and powers of the superintendent. It invests him with certain authority and power necessary to enable him effectively to execute and enforce the law, and make it subserve the object for which it was passed. For the purpose of obtaining information and thoroughly understanding the condition of insurance companies, they were required to furnish him with certain statements and facts; and a refusal to comply with that duty was made a misdemeanor. Therefore, whenever they fail to comply with or violate the provisions of the said thirteenth section, they are liable to be proceeded against for a misdemeanor. The *qui tam* action provided for in the forty-third section may be used in case of other violations, and possibly may be regarded as a cumulative remedy; but it is not necessary to express any positive opinion upon that point. For a reversal of the judgment, it is contended that the provisions of the law under which the conviction took place are unconstitutional: first, because they relate to a subject not included within the title of the act applicable to this case; second, because the duties and burdens devolved on the appellant's company are an impairing of the obligation of a contract. As to the first point, the constitution declares that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title (Const. Mo., art. IV, § 32). In the case of the City of St. Louis v. Tiefel, 42 Mo. 578, we had occasion to examine this question with some care, and have seen no reason for departing from the conclusions there arrived at, or to change the construction then placed upon the clause. In that case the title was "An act amendatory of an act to enable the city of St. Louis to procure a supply of wholesome water." The act, after authorizing the board of water commissioners to require owners of buildings to take out water licenses, went on to provide, in substance, that parties who failed or neglected to comply with its provisions, should be subject to certain penalties, and enacted how the penalties should be recovered. These provisions, we held, related to the subject embraced within the title, and were congruous and connected with it, and were entirely valid. The question in that case and the present one is precisely analogous. The board of water commissioners were invested

with certain powers, and the penalty was essential to make those powers effectual. So, in the organization of the insurance department, it was necessary, in order to carry out the act, to empower the superintendent to do certain things; but the power would have been fruitless without authority to enforce it. To say that a separate chapter must be enacted for every provision in the framework of a law, with a distinct title, would be almost impossible and wholly ridiculous.

In Michigan, where the same constitutional provision exists, it was held that the title of "an act to establish a police government for the city of Detroit" was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxation for its support, and courts for the examination and trial of offenders, might constitutionally be included in the bill under this general title. (People vs. Mahoney, 13 Mich. 495.) Suppose the Legislature should pass an act entitled "An act to incorporate the city of St. Louis," would it be necessary, by a separate act, to provide for the organization of a police court, and then by another act to provide for taxation, and so on for all the other departments necessary for a city government? Most assuredly not. Yet this is what the narrow construction contended for would lead to. Such a view would produce an endless multiplicity of bills, and would cripple, retard, and impair legislation. The provision is one of the wisest to be found in the constitution, and was intended to effectually inhibit diverse subjects being put in the same bill, by means of which great frauds were committed and dishonest combinations formed. So that the matter is germane, connected and congruous, and relates to the same subject, the generality of the title will not be objectionable. I agree with the New York Court of Appeals that "there must be but one subject; but the mode in which the subject is treated, and the reasons which influenced the Legislature, can not and need not be stated in the title, according to the letter and spirit of the constitution." The title "to create an insurance department" was sufficient to cover the section providing for a penalty for violating the law. It was a part of the

same subject, and absolutely necessary to carry it into effect. The same reasoning applies to the other division of the insurance law. The title is "for the incorporation of insurance companies other than life assurance companies, and for the regulation of insurance business other than life assurance business." No person reading this title would misapprehend its real meaning or be misled as to the subject treated of in the chapter. It includes all business and all companies other than life insurance companies and business, and therefore comprehends the defendant's company. The next question is, is the law objectionable, when applied to defendant's company, as impairing the obligation of a contract? It is settled law that a private charter is a contract between the government and the company to which it is granted, and that, as such, it is secured by the constitution of the United States from violation by the State conferring it. But, while private charters are thus protected in their franchises, and are secured against an infringement of their rights, it is also true that corporations, like individuals or natural persons, are subject to those laws which the State may prescribe for the good government and regulation of the community and the protection of the citizen. In New York, the Legislature enacted a law that it should and might be lawful for the attorney-general of the State, and it was made his duty, whenever an incorporated bank was insolvent or had violated any of the provisions of the act incorporating it—and it was also made lawful for any creditor of any such company—to apply by petition to the court of chancery, setting forth the facts and circumstances of the case; and, upon its being proved to such court that such company was insolvent, or that it had violated any of the provisions of the act incorporating it, or any other act binding upon it, it should and might be lawful for such court to issue an injunction to restrain the company and its officers from exercising any of the privileges and franchises granted by the act incorporating it, or by any other act, and from collecting or receiving any debts, and from paying out or transferring any of the moneys or effects of such company, until such court should otherwise order; and it was made lawful for such court to appoint a receiver of the property, moneys, and

effects of the company, and to distribute the same among the fair and honest creditors thereof. The Court of Errors, the highest court of judicature in the State, held that the act was valid, and not an unconstitutional law, in respect to incorporations granted previous to its passage. (*Bank of Columbia v. Attorney-General*, 3 Wend. 588.) A question nearly parallel with the one in the present case arose in Massachusetts. There the statute enacted that bank commissioners should be appointed by the governor; that they should visit the banks, and should have free access to their vaults, books, and papers, and should make all such inquiries as might be necessary to ascertain the condition of the banks and their ability to fulfill their engagements, and whether they had complied with the provisions of law. And the commissioners were empowered to summon and examine, under oath, the officers and agents of the banks in relation to their transactions and business. And the act provided that any officer or agent who should refuse, without justifiable cause, to appear and testify when thereto required, should be subject to fine and imprisonment. It was held that the law applied to all banks existing as well before as after its passage, and that it was no infraction of the constitution—Shaw, C. J., saying: "But such immunities and privileges do not exempt corporations from the operation of those laws made for the general regulation and government of the citizen. If a law is made fixing the rate of interest, and what shall be deemed usury and its legal consequences, corporations, as well as individuals, must conform to it." (*Commonwealth v. Farmers' & Mech. Bank*, 21 Pick. 542; *Com. Bank of Rodney v. State*, 4 Sm. & M. 439.)

The laws passed in the different States requiring railroad companies to erect fences along the line of their track, have been upheld on the ground that they were in the nature of police regulation, and applied to all roads, whether chartered and in operation before the laws were passed or not. (*Gorman v. Pacific R.R.*, 26 Mo. 441; *New Albany & Salem R.R. v. Tilton*, 12 Ind. 3; same *v. Maiden*, *id.* 10; see also *Illinois Central R.R. v. Swearingen*, 33 Ill. 289.)

Those laws are not passed exclusively for the protection of

Zallee v. The Laclede Mut. Fire & Marine Ins. Co.

owners of stock, but for the security and safety of passengers, whose lives are endangered by accidents which would be likely to occur in consequence of stock being on the road. Corporations are, and of right ought to be, as much subject to police regulations as natural persons. The injury resulting from violations of law by them may be even greater than where the infraction comes from individuals. It is the duty of the State to protect her citizens in all their rights; and this power, inherent in every sovereignty, can not be surrendered even in the granting of a charter. In these days, when corporations are multiplied to an almost endless extent, when the business of insurance has swelled into enormous magnitude, when corporations have received large premiums and failed to pay their losses on account of mismanagement and insolvency, it is simply justice to the community that thorough regulations should be adopted for its protection. The insurance laws of this State were intended to furnish such protection, by investing the superintendent with sufficient power to institute an examination into the affairs and management of the various companies doing business within our territorial limits. If the examination proves satisfactory, the people can then rely upon their safety and patronize them with confidence; if they are shown to be unreliable and unsafe, the proper steps may be taken to place them in liquidation, and their power for defrauding the public will cease. We find no objection to the law on any ground that has been urged against it.

The judgment will therefore be affirmed. The other judges concur.

JOHN C. ZALLEE, Respondent, v. THE LACLEDE MUTUAL FIRE
AND MARINE INSURANCE COMPANY, Appellant.

1. *Arbitration and award—Appraisal—Insurance companies.*—Certain insured goods being damaged by fire, the owner and the insurance company, in pursuance of the provisions of the policy, agreed in writing upon a board of appraisers to examine the injured goods and estimate the owner's loss. This was done, but the appraisers were not sworn: *held*, that the transaction was not, in the accepted legal sense of the term, a submission to arbitration, but

Zallee v. The Laclede Mut. Fire & Marine Ins. Co.

merely an appraisal, and for the reason that a submission to arbitration presupposed contesting parties and a subsisting controversy; whereas, in the case indicated, the original agreement fixing the method of ascertaining the *quantum* of damages in case of loss, formed a part of the original contract of insurance, viz.: of the company's charter, which was made part of the policy; and further, because by the terms of that instrument the finding of the appraisers was to be a report, to be used as evidence touching the loss, and not, as in case of an arbitration, as a bar to a suit on the policy. In such case the written agreement entered into after the fire, appointing the appraisers, and by which the parties agreed to accept their appraisal, was a practical carrying into effect of the stipulations of the policy.

2. *Arbitration and award — Appraisal — Insurance Policies — Distinction between arbitration and appraisal.* — Where the stipulations of a fire insurance policy have actually been complied with, and appraisal of losses had in conformity thereto, the insurance company and the insured should be bound by the result, notwithstanding that the appraisers were not sworn. They acted as appraisers, and not as arbitrators. The reference to them was not a submission to arbitration, in a legal sense, for the purpose of settling and extinguishing a cause of action, but a just and reasonable mode of fixing values—the value of the injured goods before and after the fire, the difference representing the amount of loss or damage.

Appeal from St. Louis Circuit Court.

Hill & Jewett, for appellant.

Krum, Decker & Krum, for respondent.

I. The agreement to submit the matters in dispute is a submission within the statute; and, as it was not shown that the arbitrators took the oath prescribed in the statute, their award is invalid. (*Toler v. Hayden*, 18 Mo. 399; *Fassett v. Fassett*, 41 Mo. 516; *Walt v. Huse*, etc., 38 Mo. 210.)

II. The provisions of the charter of the company, the policy sued on, and conditions annexed, do not change the question. It is still an agreement to submit the matter in dispute to arbitration.

CURRIER, Judge, delivered the opinion of the court.

This is a suit on an insurance policy. The insured goods, or a portion of them, having been damaged by fire, the parties, in pursuance of the provisions of the policy, agreed in writing upon a board of appraisers to examine the injured goods and estimate and determine the amount of the plaintiff's loss thereon. The persons agreed on made the required examination, and assessed

Zallee v. The Laclede Mut. Fire & Marine Ins. Co.

the plaintiff's damage at \$302.44. The appraisers were not sworn. The result proved unsatisfactory to the plaintiff, and he now treats the appraisal as void, and seeks to recover damages independently of it. The appraisal is supposed to be void for the reason that the appraisers were not sworn. This view of the case rests upon the theory that the appraisal was the result of a submission to arbitration under the statute in relation to arbitrations and references (Gen. Stat. 1865, ch. 198), the appraisers having been appointed in writing.

It has always been deemed sound policy to encourage the adjustment of private difficulties and misunderstandings through the instrumentality of an arbitration. The results of such proceedings are favorably considered and liberally construed. Whether this policy would not have been better conserved by treating awards not sustainable under the statute as awards under a submission at common law, and therefore only subject to common-law tests of their sufficiency, it is not necessary here to inquire. It is well, however, not to overlook the established principles of the law on this subject, in passing upon the transaction under consideration, in order to the avoidance of an erroneous classification of it, thereby unnecessarily enlarging the number of void private adjustments. These adjustments, without an appeal to the courts, as already observed, it is the policy of the law to encourage.

The question raised by this record is this: was the transaction described, in the accepted legal sense of these terms, a submission to arbitration? Or was it an appraisal only?—something less than an arbitration. If it was an arbitration, in the legal sense, and the arbitrators had been sworn, then the antecedent cause of action would have been merged in the award. The award would then have become the ground of action, or of proceedings, in the Circuit Court. But it has not been claimed that the finding of the appraisers, had they been sworn, would have merged in itself the prior cause of action. No such view has been taken of the subject. The award, or finding, has been used, or sought to be used, as evidence conclusive, as to the amount of damage, but not as a bar to the action.

A submission to arbitration, in the legal sense, implies contesting parties and a subsisting controversy. But there was no controversy here when the original agreement, fixing the method of ascertaining the *quantum* of damages in case of loss, was entered into. The agreement formed a part of the original contract of insurance, in fact, of the defendant's charter, which was referred to and made part of the policy.

The charter provided that "in case of loss or damage by fire, the valuation of such property, at the time of such loss or damage, should be determined by the award of impartial men." It was further provided in one of the conditions of the policy that in case the goods insured should be injured, the resulting damages should be "ascertained by the examination and appraisal of such damage, on each article, by disinterested appraisers, mutually agreed upon, whose detailed report in writing should form a part of the proof required to be furnished by the claimant." Here the finding of the appraisers is spoken of as a "report" which was to be used as evidence, and not as a bar to a suit on the policy.

After the fire the parties agreed in writing to "accept the appraisement" of Hugh Boyle "and another, and these appraisers in due time reported in writing that they had examined the stock above described, and assessed the damage at \$302.44." The policy made it the duty of the assured to assort and arrange his goods, where they had been damaged but not destroyed, with reference to a convenient ascertainment of the extent of the injury. This appears to have been done. The whole proceeding was had in accordance with the provisions of the contract of insurance. The written agreement entered into after the fire, appointing the appraisers, and by which the parties agreed to accept their appraisement, was a practical carrying into effect of the stipulations of the policy. These stipulations having actually been complied with, and an appraisal had in conformity thereto, no good reason is perceived why the parties should not be bound by the result. That result can not, and ought not to, be avoided on the ground that the appraisers were not sworn. They acted as appraisers, and not as arbitrators. The reference to them was

Zallee v. The Laclede Mut. Fire & Marine Ins. Co.

not a submission to arbitration in the legal sense, but a just and reasonable mode of fixing values—the value of the injured goods before and after the fire, the difference representing the amount of loss or damage.

If this transaction is to be adjudged an arbitration, and so within the statutes, the submission being in writing, then it must be held that the valuation of a household, for the purpose of renewal, when determined by appraisers, on the disagreement of parties, is an arbitration, and subject to the rules and tests which govern technical arbitration awards.

There have been adjudications bearing on this question. In *Garred v. Doniphan*, 10 Mo. 161, an appraisement was sued on as an award. It was held that the action would not lie because the appraisement was not an award, although it partook of the nature of an award made in pursuance of a submission to arbitration. In *Curry v. Lackey*, 35 Mo. 389, it was held that the determination of a referee mutually chosen, awarding the difference in value between articles of property, exchanged by the parties to the submission, was no award in the proper legal sense of that term. The submission and finding were both in writing. The result, as in the case at bar, was resisted on the ground that the appraiser was not sworn. These cases clearly distinguish between submissions to arbitration for the purposes of an appraisement and submission to arbitration for the purpose of settling and extinguishing causes of action. Only the latter are technically and strictly arbitrations. These, when the submission is in writing, are held to be within the statute; but the former—cases of appraisement—are not so. The case at bar falls within the first-mentioned class, and is therefore outside the statute.

For that reason the judgment must be reversed and the cause remanded. The other judges concur.

GEORGE W. TURNER, Appellant, v. TERESA TURNER, Respondent.

1. *Equity—Fraudulent conveyances—Consideration—Undue influence.*—A conveyance obtained without sufficient consideration by a person resorting to undue influences, or practicing fraud or deception, will generally be set aside. Fraud and mistake vitiate and avoid a conveyance without regard to the sources whence they originated, or the effect which they produce. But in order to avoid a grant on the ground of undue influence, it must be shown that the influence existed and was exercised for an undue and disadvantageous purpose. Where influence is shown to have existed, or to have been unduly exercised, or confidence to have been reposed and abused, its source will be immaterial, a man being as much bound to act for the best interests of another who has trusted him as a friend as if he had been appointed a trustee or agent.

Appeal from Fourth District Court.

The facts appear in the opinion of the court.

James M. De France, with *Ewing & Holliday*, for appellant.

I. The defendant acquired the title to her property by "actual fraud, arising from plain facts and circumstances of imposition." (*Chesterfield v. Jansen*, 2 Ves., Sr. 155.) "Fraud or covin may, in judgment of law, avoid every kind of act." (*Bright, Ex'r, v. Eynon*, 1 Burr. 390—see p. 395, at bottom—citing *Fermon's case*, 3 Co. 77.)

II. Courts of chancery have an undoubted jurisdiction to relieve against every species of fraud. (1 Hovenden, 17.) Where a father obtains an absolute conveyance from a daughter, in order to answer one particular purpose, and afterwards makes use of it for another, a court of chancery will relieve under the head of fraud. (*Young v. Peachy*, 2 Atk. 254; *Picket v. Loggon*, 14 Ves. 234; 2 Hovenden on Fraud, 108.)

III. Fraud and mistake vitiate and avoid a conveyance, without regard to the source whence they originate, or the effect which they produce. (3 White & Tudor's Lead. Cas. in Eq. 124.)

IV. It is thoroughly settled that when undue influence has been used, or a fraud actually committed, equity will not stop short with the guilty party, but will grant relief against every

Turner v. Turner.

one who attempts to sustain the wrong, or profit by it, however innocent he may have been in the first instance. (3 White & Tudor's Lead. Cas. in Eq. 151-2; 11 Wheaton, 103.) Whenever a conveyance has been obtained by a *suppressio veri* or *suggestio falsi*, it may be altogether avoided. (2 Hoven. on Fraud, 105.)

V. If the wife elope, a chancery court will not assist her in recovering her own property, which had been settled to her separate use. (Lee v. Lee, 1 Dick. 321; same case, 2 Dick. 806; Clark v. Lott, 11 Ill. 105; Moore v. Moore, 2 Atk. 272; Ayer v. Ayer, 16 Pick. 327.)

Ellison & Ellison, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a petition in the nature of a bill in equity, seeking relief from a conveyance made at plaintiff's instance and request to defendant, and asking that the title to certain property therein conveyed be divested from the defendant and restored to the plaintiff. The petition states that the plaintiff and defendant were legally married, and were living together as man and wife, when the plaintiff purchased of W. P. Linder and paid for two several lots of ground in Linder's addition to the town of Kirksville, in Adair county; that defendant begged and importuned plaintiff to have the deed to the property made to her, and that in consequence of her importunities he was finally prevailed upon to do so to gratify her; that at the time he had the utmost confidence in her love, fidelity, and chastity, and that she also persuaded and encouraged him to improve the property and expend his means thereon; that he did lay out and expend all his means in building a house and making permanent improvements on the lots, and, as soon as that was accomplished, defendant abandoned the plaintiff. The petition further avers that the defendant before, and at the time and after Linder made the deed to her, was clandestinely, and secretly, and wholly unknown to the plaintiff, committing adultery with one Leonard Johnson and one George Rice, and others whose names are not known; that before

Turner v. Turner.

and at the time said deed was made to her, she was in collusion with said Linder and her adulterers, who were aiding and assisting her in her attempt to overreach, cheat, and defraud plaintiff out of his property, intending wrongfully and through fraud to obtain title to said real estate, and induce plaintiff to expend all his means on the same, and, as soon as that was accomplished, to abandon him and live in adultery with Rice and Johnson; that the title to the property was acquired by the defendant willfully and designedly, through fraud and deceit; that she subsequently eloped with Johnson, and is now living in adultery with him, and that plaintiff has been divorced from her by decree of court. The Circuit Court sustained a demurrer to this petition, and rendered judgment thereon for the defendant, which judgment was affirmed in the District Court. The petition alleges a state of facts which, if true, shows that the plaintiff has been made the victim of one of the grossest outrages which it is possible for the human mind to conceive of—a deliberate attempt by a faithless wife, in conjunction with her guilty confederates, not only to rob her husband of his peace, and dishonor him, but also to wrest from him all his property. Not satisfied with turning him out in the world smarting under the stings of a most heinous and grievous wrong, they proceed further in their iniquitous career and reduce him to beggary. A conveyance obtained without sufficient consideration by a person resorting to undue influences, or practising fraud or deception, will generally be set aside. Fraud and mistake vitiate and avoid a conveyance, without regard to the sources whence they originate or the effect which they produce. But, in order to avoid a grant on the ground of undue influence, it must be shown that the influence existed and was exercised for an undue and disadvantageous purpose. It will not be avoided on the ground of undue influence, when it is just in itself and in its consequences. (*Cruger v. Douglass*, 4 Edw. Ch. 433, 525, 532.) In *Whelan v. Whelan*, 3 Cow. 537, the general principle was held that influence on one side evidently exerted to produce disadvantageous results on the other, will justify chancery in setting aside a conveyance, even when not alleged or proved to amount to actual fraud. There seems to be little doubt that undue influence

on one side, coupled with the injury on the other, will be enough to set aside a conveyance even where there is no ground for imputing fraud or unfair dealing. Thus, in *Slocum v. Marshall*, 2 W. C. C. R., 397, a daughter was induced by her father to convey to him her reversionary interest in certain real estate, after the expiration of his life estate as tenant by the courtesy, for the purpose of enabling him to make a title to the property, with an understanding that he would hold it and its proceeds, if sold, in trust for her benefit. There was no doubt that the deed had been procured by an exertion of parental influence, and had proved disadvantageous to the child, and this was held sufficient to render it voidable, although the circumstances repel the idea of fraud or improper motives on the part of the father. Where influence is shown to have existed, or to have been unduly exercised, or confidence to have been reposed and abused, its source will be immaterial—a man being as much bound to act for the best interests of another who has trusted him as a friend, as if he had been appointed a trustee or agent. (*McCormick v. Malin*, 5 Blackf. 509.) The case of *Freeland v. Eldridge*, 19 Mo. 325, illustrates the principle we are now enforcing. There the wife of the plaintiff and her father entered into a league and confederated together for the purpose of cheating and defrauding the plaintiff out of his property. The plaintiff, whose mind was weak, was made to believe that he was in great danger, and that he could only be protected by conveying his property to the defendant, who was his friend and his wife's father, and then leaving the country. The defendant agreed to pay \$1,800 for the property by giving his note for that amount to his daughter, the plaintiff's wife. This was merely a cover for the transaction; and the note was immediately handed back by the daughter to her father. There was, in addition, a combination between the defendant and plaintiff's wife to procure a separation between plaintiff and his wife when the property was obtained. Upon this state of facts the court below set aside the conveyance, and this court affirmed the judgment. In *Freeland's* case, as in the case at bar, the wife was the active instrument and agent in trying to defraud and cheat her husband. As we have seen, a conveyance will some-

Turner v. Turner.

times be avoided and set aside where it is procured by an influence exerted on one side with the evident design of producing disadvantageous results. A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name. If it was done with an honest intent, to secure a home for herself and her offspring, the transaction would not only be legal, but praiseworthy. But if the influence was exerted with the design of despoiling the husband and then abandoning him, and sharing the ill-gotten gains with some other person, the law would condemn and stigmatize the transaction. But the petition does not rest this case upon the exertion of influence and importunities merely. There is an express and positive allegation of fraud, which stands admitted by the demurrer. It is the recognized doctrine in every civilized state that a title procured by fraud, or a plain and positive deception, is tainted throughout—destitute of all validity, and utterly void in law as well as equity. In the District Court, this cause seems to have been decided on the authority of *Alexander v. Warrance*, 17 Mo. 228, on the ground that no trust results to a husband who purchases property and causes it to be conveyed to his wife. In ordinary cases that is the law, and the conveyance will be adjudged an advancement for the benefit of the wife. But there is no question of resulting trust here. The allegation is that the conveyance was procured by fraud, and, if that should turn out to be true, it uproots the title through and through. The judge, in his opinion in the District Court, says the plaintiff is a victim, but he has no legal remedy. If such were the case it would be a reproach and a scandal to the law; but we are not of that opinion. We see no difficulty in his getting full and adequate redress.

I think the judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer and give the defendant leave to answer. The other judges concur.

In the matter of Lind v. Clemens, Jr.

IN THE MATTER OF J. B. LIND, Respondent, v. JAMES CLEMENS,
Jr., Appellant.

1. *County Court—Public roads—Seizure of private property for—Act of March 10, 1849—Proof as to effort to make bargain.*—The 13th section of the law "about roads in St. Louis county" (Sess. Acts 1849, p. 593), in effect authorized the seizure of material belonging to individuals, for road purposes, only "when no private bargain could be made on fair terms." Under this law the County Court could not authorize a contractor for building a public road to divest the owner of his property for such purpose, when the proof before it failed to show any attempt to make a bargain with the owner or the offer of any compensation for the material.
2. *Eminent domain—Private property taken for public use—Law authorizing the taking must be strictly complied with.*—Whenever, in pursuance of any law, the property of an individual is to be divested against his will, there must be a strict compliance with all the provisions of the law authorizing such a proceeding.

Appeal from St. Louis Circuit Court.

A. M. Gardner, for appellant.

I. The petition does not show, nor does the petitioner claim, that he offered or tried to make a private bargain with the owner for the rock or for the use of the quarry. Whenever the property of an individual is to be divested by proceedings against his will, there must be a strict compliance with all the provisions of the law. (*Reitenburgh v. Chester Valley R.R. Co.*, 21 Penn. 100; *Vail v. Morris & Essex R.R. Co.*, 1 Zab. 189.)

II. No compliance with the law being shown in this case, the whole proceedings of the County Court were null and void, and their judgment should be reversed. (*Stacy v. Vermont Central R.R.*, 27 Verm. 39; *Blackwell on Tax Titles*, 294; 1 Redf. on Rail. 239; *Balt. & S. R.R. Co. v. Nesbit*, 10 How. 395.)

Clover, for respondent.

WAGNER, Judge, delivered the opinion of the court.

When this case was before this court on a previous occasion, it was decided that the appeal from the County Court to the Circuit Court did not authorize a trial in the latter court *de novo*, but

In the matter of Lind v. Clemens, Jr.

that still it was the duty of the Circuit Court to ascertain from the record whether the County Court exceeded its jurisdiction or proceeded illegally in reference to the subject-matter before it. (St. Louis v. Lind *et al.*, 42 Mo. 348.)

After the case was remanded, the Circuit Court, upon an inspection of the record, was of opinion that no error was committed in the County Court, and therefore affirmed its judgment, and the case is again here by appeal.

The proceeding was had under the thirteenth section of the law "about roads in St. Louis county," approved March 10, 1849. (Sess. Acts 1849, p. 593.) The section provides that if, in the construction of any of the public roads of the county, it shall become necessary to use stone, timber, or earth belonging to individuals, and no private bargain can be made on fair terms for the purchase of the same, it shall be lawful for the County Court to order the marshal of the county to summon a jury of six citizens not owning property on the road to be improved, who shall assess the damages to the freehold, and the value of the material wanted for public use; and if, upon the return of the verdict, the County Court shall assume to pay the damages and the value of the material thus to be taken, then it shall be lawful for the County Court, by its servants, agents, or contractors, to take and carry away, for the use of the public, such stone, timber, and earth as may be wanted.

Lind contracted to do certain work on the Olive street road, and he represented in his petition to the County Court that no quarry could be opened within a reasonable distance of the work whence he could obtain material, except the quarry which was already opened on the lands of Clemens. He also stated that he could not get permission from Clemens for the procurement of rock out of the quarry, although it would do very little or no injury to Clemens' property.

Upon this petition and representation, the County Court ordered the marshal to summon a jury to assess the damage, which was done. Clemens objected to the amount awarded, and moved the court to set the award aside, which motion was overruled, and this is the grievance complained of. Clemens was notified to

Koch et al. v. Branch et al.

appear before the jury when the assessment was made, but the record does not show whether he was present or paid any attention to the notice.

The well-established and firmly-settled principle of law, founded in justice and reason, is that, whenever in the pursuance of any law the property of an individual is to be divested against his will, there must be a strict compliance with all the provisions of the law authorizing such a proceeding. So, if the statute only authorized proceedings *in invitum* after an effort had been made to agree with the owner on the compensation to be made, the fact of such effort and its failure must appear. (Reitenbaugh v. Chester Val. R.R. Co., 21 Penn. St. 100.)

The proceeding here was only authorized "when no private bargain could be made on fair terms." There is nothing to show that any attempt was ever made to make a bargain, or that any compensation was ever offered for the materials. The owner might well have refused to give permission to part with his property, when he would have been entirely willing to have sold it for a fair remuneration.

The opinion of Lind, when he was trying to wrest and appropriate Clemens' property, that it would do him very little or no injury, can not be regarded as of any great weight, nor can it help out the defective compliance with the law.

In my opinion, the judgment should be reversed and the cause remanded for further proceedings, etc. The other judges concur.

AUGUST KOCH *et al.*, Appellants, *v.* BRANCH & CROOKES,
Respondents.

1. *Agency — Commissary vouchers, when stolen, what title passes to purchaser.* — "An U. S. commissary voucher is not, in the commercial sense, a negotiable instrument, and the law merchant has no application to it. It is, however, property, or rather a convenient representation of property, and when actually sold, passes by delivery, like other personal property. But the purchaser can acquire no greater right than the seller, and when the property is stolen, there can be no further transfer. An agent who collects the money on such a voucher, for an innocent purchaser thereof after the voucher has

Koch et al. v. Branch et al.

been stolen, will be liable for its value to the original owner. A sale of the property by the agent is evidence of conversion; and, to hold him liable, it is not necessary that he should use the proceeds of the conversion for his own benefit.

2. *Agency — Conversion — What constitutes.*—The fact that one takes possession merely of stolen property, as a depositary or common carrier, is not sufficient to charge him with conversion. Some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some other intermeddling, inconsistent with the owner's right, should be found, in order to make the person responsible who has obtained innocent possession.

Appeal from St. Louis Circuit Court.

Finkelnburg & Rassieur, for appellants.

S. Knox, for respondents.

BLISS, Judge, delivered the opinion of the court.

In February, 1864, the plaintiffs were engaged in mercantile business at Fort Smith, Arkansas, and purchased of one Hunt, an army beef contractor, a commissary voucher issued to him for \$1,448. Soon after its purchase it was stolen from the store, and the thief was never discovered. In February, 1865, one Richard Branch purchased the voucher of a stranger and forwarded it to his brother in St. Louis, one of the defendants, who collected it of the government and paid over the amount to his brother, charging no commissions. He was a partner of the firm of Branch, Crookes & Co., composed of defendants, and made the collection in their name. There seems to be no dispute about the facts, and, in the trial below, the court declared, as matter of law, that the plaintiffs were not entitled to recover.

It is admitted that the defendants received no benefit from the transaction; but the plaintiffs claim that the paper was not negotiable, and continued to be their property into whosoever hands it went; that defendants controlled it for a time, converted it into money and paid it over, and thus were the cause of the plaintiffs' ultimate loss.

A voucher of this kind is simply an account against the government, approved by the officer who received the property embraced

Koch et al. v. Branch et al.

in it, and is paid on presentation. It is not, in the commercial sense, a bill of exchange or other negotiable instrument, and the law merchant has no application to it. It is, however, property, or rather, convenient representation of property, and when actually sold passes by delivery like other personal property. But the purchaser can acquire no greater right than that of the seller, and when the property is stolen there can be no further transfer. It does not, like a note or bill, become the property of an innocent holder by virtue of its negotiability, for he can only hold it as his own by virtue of his title, and no title can pass through a thief. This principle has no relation to the doctrine of title by purchase in *market overt*, for that is part of the common law never adopted in this country.

Admitting that Richard Branch had no title to the voucher when he sent it to the defendants for collection, does their agency in the matter so involve them in the plaintiffs' loss as to subject them to liability? The answer to this question depends upon the character given to such a voucher. If it is a mere account—a memorandum of a claim, its loss is nothing. A new one could be made just as good. But it is much more. It is, as we have seen, an audited demand, specifically represented by the paper, and which will be paid only on its presentation. It, therefore, represents the claim, has value in itself, is an object of barter and sale, and I can see no reason why it should not be treated as other property. The liability of those who meddle with stolen property, and do anything in regard to it, by which the owner is prevented from recovering it, has been fixed by repeated adjudications. We are referred, in this country, to *Hoffman v. Carow*, 22 Wend. 285, which is an affirmance by the Court of Errors of a judgment of the Supreme Court, reported in 20 Wend. 21; and to *Rogers v. Hine*, 1 Cal. 420. In both cases an auctioneer was held liable to the owner of stolen goods for their value, although he sold in the usual course of trade, without knowledge of the felony or the claim of the owner, and paid over the proceeds to the person for whom the sale was made. His sale was construed to be a conversion, although made for the benefit of others. The doctrine of *Hoffman v. Carow* has never been

Koch et al. v. Branch et al.

departed from in New York or elsewhere that I know of, but constantly affirmed. Justice Beardsley, in *Schroeppel v. Corning*, 5 Denio, 240, says that "any wrongful act which negatives or is inconsistent with the plaintiff's right, is a conversion. It is not necessary that the defendant should have made use of the property in any way." In England, the ancient doctrine that title passed for everything sold in *market overt*, with the requirement that the felon must be prosecuted to conviction before the property itself can be pursued, destroys the authority in this country of many of its decisions. And yet, when nothing intervened to suspend the vindication of the owner's title, the same ruling is had as in *Hoffman v. Carow*, and *Rogers v. Hine*. In *Stephens v. Elwall*, 4 Maule & Selw. 259, the plaintiffs were the assignees in bankruptcy of one Spencer, and his goods, by the act of bankruptcy, became vested in them. The bankrupt sold to one Deane, who bought for a trader in America, who had a house in London, in which defendant was his clerk. Defendant received and shipped the goods to his principal, which act was held to be a conversion. Lord Ellenborough remarks: "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it." Le Blank, Justice, had held at the trial that the defendant was not liable, but, in *banc*, said that he was mistaken. For further reference to the English decisions as to what constitutes conversion, see Bacon Ab., title *Trover*, under subdivision B.

The cases above cited may not go quite the length of the present one, yet I can see no difference in principle. The plaintiffs are deprived of their property through the wrongful, *i. e.*, unauthorized, act of defendants. They converted it, *i. e.*, turned it into money, and paid over the money to their principal without authority. A sale of another's property evidences conversion, and a demand in those States, where it is in general necessary, becomes useless. So, by analogy, would be any other voluntary

Koch et al. v. Branch et al.

act which changed its character and placed it beyond the reach of the owner. It is not necessary that he use the proceeds of the conversion for his own benefit.

In all these cases the defendants complain of the hardship of being held for a wrong, when no wrong was intended. It may seem hard, but it is no harder than for the plaintiffs, without fault on their part, to lose their property. And besides, the defendants, without designing to injure the plaintiffs, were, as well as their principal, guilty of neglect. No one should buy property without good reason to believe that the seller has a right to sell it. The loose habit that prevails of buying everything that is offered is but a bounty to theft. If thieves found purchasers less eager for cheap bargains, though from total strangers, they would find it less easy to follow their avocation. Public policy, as well as private rights, demands that the settled rule, that no title can pass through a thief, should not be relaxed, and those who buy it of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents also should be held to the same accountability. It is their duty to know for whom they act, and whether they can be saved harmless if their action shall amount to a conversion of another's property. Every exoneration from responsibility in the premises but facilitates the enjoyment of the fruits of larceny, and the hardship one suffers in a case like that under consideration is but one of the every-day fruits of a want of proper caution in business.

This doctrine of conversion should not, however, be carried too far. It is not the fact that one takes possession merely of property, as a depositary or common carrier, that should charge him, but some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some other intermeddling inconsistent with the owner's right should be found in order to make the person responsible who has obtained innocent possession.

With the concurrence of the other judges, the judgment of the Circuit Court is reversed and the cause remanded.

The City of St. Louis v. Weber.

THE CITY OF ST. LOUIS, Respondent, v. FREDERICK WEBER,
Appellant.

1. *Corporations — Charter of St. Louis — Meat shops — City council.*—The city of St. Louis, under the charter of March 3, 1851, authorizing the city council to "establish markets and market places, and to regulate the vending of meat," (Sess. Acts, 1851, p. 155,) had power to provide by ordinance that no person, not being the lessee of a butcher's stall, should sell or offer for sale in market, or in any other place, any fresh meat in less quantities than one quarter (City of St. Louis v. Jackson, 25 Mo. 37), and the tenth and thirty-first subdivisions of section 1, art. 4, of the revised charter of March 13, 1867 (Sess. Acts 1867, p. 63), did not have the effect of repealing that power.
2. *Corporations — Granted powers, exercise of — Reasonableness of.*—Corporations can not go beyond the powers granted to them, and must exercise such granted powers in a reasonable manner. And courts must judge in each case before them, whether the exercise of the power be reasonable. A clear case should be made out to authorize an interference by them on the ground of unreasonableness.
3. *Ordinances — Meat shops — Reasonableness of ordinance 5,832.*—Ordinance 5,832, in relation to markets in the city of St. Louis, excepting from the prohibition of meat shops that part of the city embraced in the new limits, and more than six squares from any market, was eminently just and reasonable.

Appeal from St. Louis Criminal Court.

• Garesche & Mead, and S. Reber, for appellant.

I. The ordinance 5,434, relating to markets, is invalid, because unreasonable and not warranted by the charter in force when it was passed. (Commissioners v. Gas Co., 12 Penn. St. 318; Mayor of Hudson v. Thorne, 7 Paige, 261; 3 Pick. 462.)

II. If the city council had power under the charter of March 3, 1851, to prohibit or suppress meat shops, the power to prohibit was taken away by the charter of March 19, 1866 (Sess. Acts 1866, p. 284, clause 2), amending the charter of 1851, and the present charter, approved March 13, 1867 (in clause 2, p. 63, Sess. Acts 1867), has the same provisions. The charters of 1866 and 1867 only confer on the city the power to regulate, and not prohibit or abolish, meat shops; and therefore also the ordinance 5,832, so far as it prohibits meat shops, is invalid. (Bethune v. Hughes, 28 Ga. 560.)

III. The charters of 1866 and 1867 repeal, by necessary

The City of St. Louis v. Weber.

implication, so much of the ordinance 5,434 as abolishes or prohibits the establishment of meat shops in any part of the city, even if that were originally a valid ordinance; and therefore ordinance No. 6,508, which is amendatory of No. 5,434, and is incomplete in itself, is inoperative, because the latter was originally void and has also been repealed.

V. All such legislation as the ordinances prohibiting meat shops is in restraint of lawful trade and therefore invalid. (City of St. Paul v. Laidlow, 2 Minn. 190; Bethune v. Hughes, 28 Ga. 560.)

Charles P. Johnson, circuit attorney, and *Krum, Decker & Krum*, and *Woerner & Kehr*, for respondent.

I. Under the charter of 1851 the validity of the ordinance in question was judicially determined. (*Jackson v. City of St. Louis*, 25 Mo. 37.)

II. The thirty-first subdivision of section 1, article 4, revised charter 1867, "to regulate the vending of meat," is not a repeal, but an additional grant of powers.

III. The meat-shop ordinances are not in restraint of trade. (*Williams v. The City Council of Augusta*, 4 Ga. 509; *Nagle v. same*, 5 Ga. 546; *Green v. Mayor and Aldermen of Savannah*, 6 Ga. 1; *City Council v. Ahren*, 4 Strobb. 241; *Wainsboro v. Smart*, 11 Rich. 551; *Shelton v. Mayor of Mobile*, 30 Ala. 540, reciting 3 Ala. 137; *White v. Kent*, 11 Ohio, 550; *St. Paul v. Troyer*, 3 Minn. 291; *Paige v. Fazackerly*, 36 Barb. 392; *Yates v. Milwaukee*, 12 Wis. 673; *Lawrenceburg v. Wuest*, 16 Ind. 337; *Ash v. The People*, 11 Mich. 247, with numerous authorities there cited; *City of Brooklyn v. Cleves*, Hill & Denio's Sup., N. Y., 231; *Perdue v. Ellis*, 18 Ga. 586.

BLISS, Judge, delivered the opinion of the court.

Defendant was fined for keeping a meat shop within the market limits, or limits within which meat shops are prohibited by the ordinances of St. Louis. Ordinance No. 5,434, in relation to markets, approved September 6, 1864, provided, by section 5, article 5, that "No person, not being the lessee of a butcher's

The City of St. Louis v. Weber.

stall, shall sell or offer for sale in market, or in any other place, any fresh meat in less quantities than one quarter." Section 1, of art. 8, of the same ordinance authorizes meat shops to be licensed in the extended new limits of the city, but not within four blocks of any market-house. Ordinance 5,832, of March 20, 1866, changed the above limits by prohibiting meat shops within six blocks of a market-house, and ordinance 6,508, section 11, imposes a penalty for the violation of section 5, art. 5, of ordinance 5,434.

The appellant urges that these ordinances are invalid, for the reason, first, that they are not warranted by the city charter; and second, if warranted, they are an unreasonable exercise of the powers granted. The charter of March 3, 1851 (Sess. Acts 1851, p. 155), authorized the council "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," and, in section 31, also to regulate "the vending of meat, poultry, vegetables," etc. This court, in *The City of St. Louis v. Jackson*, 25 Mo. 37, expressly affirms the power of the city under the authority cited to pass an ordinance in the precise language of section 5, art. 5, of ordinance 5434 above quoted, and we can see no sufficient reason for disregarding that decision, although there are some authorities apparently adverse to it. Appellant claims such changes in legislation, both by the State Legislature and city council, as to make the question a new one.

A revision of the city charter was had March 18, 1867 (Sess. Acts 1867, p. 58), which changed the phraseology of the previous grant. The eleventh subdivision of section 1, article 4, p. 63, grants the council power "to erect market-houses, purchase market-houses already erected, * * establish markets, market-places, and meat shops, provide for the government and regulation thereof, and the amount of licenses to be paid therefor;" and the thirty-first subdivision gives power * * "to regulate the vending of meat, poultry, fish, and vegetables, etc." This revision, it is claimed, changes the power, and operates as a repeal of the previous ordinance. If it took away the power to pass such an ordinance, it would have that effect; but the only

The City of St. Louis v. Weber.

change I can see is that the revision adds to the former power of establishing markets, also that of establishing and licensing meat shops. It leaves the former power of establishing and regulating markets and regulating the selling of meats untouched; so that if an ordinance like the one under consideration in *The City v. Jackson* were lawful under the former charter, it is so under the revision.

It can not be claimed that the city council can derive any authority for an ordinance already adopted, from the new powers given by the amendment to the charter of 1868, referred to by counsel, and I do not understand the validity of the one in question, or of that part of it involved in this suit, to depend upon the act of that year, but rather upon the power long before given to "establish markets and market places," and "to regulate the vending of meat," etc. These two powers are very broad and comprehensive, and existing as they did before the ordinance in question, and being embraced in every amendment, would seem to warrant any reasonable legislation upon the subject.

The matter of the second claim, that the council have executed their power in an unreasonable manner, has not been adjudicated. That corporations have none of the elements of sovereignty, that they can not go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner, are propositions that can not be disputed. And the court must judge in each case whether the exercise of the power be reasonable. (*Commonwealth v. Worcester*, 3 Pick. 462, 473.) If this ordinance is oppressive, unequal, and unjust; if it be not a legitimate regulation of the vending of meat, but partial and unfair, establishing monopolies, or subjecting either the seller or purchaser to unnecessary inconvenience or expense, it certainly should not be upheld. In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted, a clear case should be made to

The City of St. Louis v. Weber.

authorize an interference upon the ground of unreasonableness. The specification in the charge of unreasonableness is the fact that meat shops are prohibited in some parts of the city, and licensed in other parts. If this distinction be the mere caprice of the council, it should not be tolerated. But we find the reason in the ordinance itself, and in our knowledge of the boundaries of the city. When the city limits were extended, they took in a large area surrounding the city proper which was far removed from the public markets, and whose inhabitants had hitherto enjoyed free trade. To compel them all to resort to these markets for their supplies would have been oppressive, and hence an exception was made in their favor until markets should be established in their midst, so that the provision in the ordinance excepting from the prohibition of meat shops that part of the city embraced in the new addition, and more than six squares from any market, was eminently just and reasonable.

Counsel for appellant desire us to reconsider the doctrine of *Jackson v. The City of St. Louis*, and adopt that of *St. Paul v. Laidlow*, 2 Minn. 190, and *Bethune v. Hughes*, 28 Ga. 560. It is useless to attempt to reconcile these authorities, for there is a clear and unmistakable conflict between them. The principles of the Minnesota case, and the opinion of the court in the Georgia case, would establish absolute free trade throughout the city in butchers' meats, and indeed in every other commodity, and would render it impossible to keep up the market system for family supplies in the cities of the State—a system believed to be, in the large towns, for the benefit of both seller and buyer, and conducive to public order, cleanliness, and health. In *Bethune v. Hughes*, the authority granted the city council in their charter was much more narrow than that of St. Louis, and the case might be reconciled with *Jackson v. The City*, but the language of Judge Lumpkin is very broad and somewhat peculiar. The only point actually decided, however, is embraced in the syllabus, which is, "that a grant to establish and keep up a market does not of itself imply the power to exclude all persons from selling elsewhere marketable articles during market hours." But the case of *St. Paul v. Laidlow* goes much further, and under

authority in the charter to establish and regulate markets, etc., and license butchers' stalls, shops, and stands, etc., an ordinance prohibiting the sale of fresh meat less than by the quarter, except at the stalls of the market, without license, was held to be illegal.

Courts are in the habit, more perhaps than they are aware, of looking to the hardship or necessity, *i. e.*, "the unreasonableness" of an act or regulation, in judging of its legality. In small towns, like Columbus, Georgia, and in an open and rural city like St. Paul, spread over a large surface, and situated in a climate where sanitary measures need hardly be considered, it is not strange that the inhabitants and courts should consider as vexatious, regulations that prevented family supplies from being delivered at the door, or that obstructed free trade in every neighborhood of the town. Regular markets, market-houses and places in such towns are hardly a necessity, and their convenience may be more than counterbalanced by the inconvenience of the restrictions necessary for their support. But in St. Louis it is very different. It has already become a town of great size, and is rapidly growing. The central and older parts are closely covered with buildings, with no ventilation but the narrow streets, and they, with all the convenience of street cars, constantly crowded. The burning heat of a large portion of the year brings rapid decomposition, and, without constant vigilance, would bring pestilence to every door. Public convenience, public decency, and public health demand that convenient and cleanly places, of easy inspection, should be provided for exposure for sale of all perishable and, especially, dressed articles of table consumption. In obedience to this demand, the city has erected large and expensive market-houses, and, at great cost, has secured grounds around them for the convenience of buyers and sellers. Let those who object to this action, or to the restrictions necessary to sustain it, imagine for a moment the condition of the streets and sidewalks, the effect upon fresh meats and tender vegetables of exposure to the soot and dust and heat of crowded blocks, if the market system were abolished. But if the system be adopted, and no one imagines it can be dispensed with, it must be supported by such restrictive legislation as shall make it exclusive;

Chillicothe & Brunswick R.R. Co. v. The Mayor, etc., of Brunswick.

and here is the real and, if the system be not necessary, the just complaint. But being necessary, such legislation does not impose burdens, but only makes reasonable regulations to sustain it. There are places, doubtless, within the bounds of the prohibition upon sales of fresh meat, quiet and airy, where it could be exposed without incommoding the public, or injuring the commodity, but these places are few; and, within the limits supplied by the markets, the restriction must be uniform, or the system falls. It seems very plain to me that an ordinance confining the retail of fresh meats to the stalls of the public market-houses, in parts of the city where they are accessible, is not an unnecessary restraint upon trade, but a reasonable regulation, and necessary to the support of the local market system of the city. The power thus to regulate is not only sustained by *Jackson v. The City of St. Louis*, but by many authorities in other States. (See *Ash v. The People*, 11 Mich. 347; *Davenport v. Kelley*, 7 Iowa, 102; *Bush v. Seabury*, 8 Johns. 418; *Buffalo v. Webster*, 10 Wend. 99.)

The judgment of the Criminal Court is affirmed. The other judges concur.

**THE CHILLICOTHE AND BRUNSWICK RAILROAD COMPANY, Relator,
v. THE MAYOR AND COUNCILMEN OF THE CITY OF BRUNSWICK,
Respondents.**

1. State *ex rel.* Mo. & Miss. R.R. Co. v. Macon County Court, 41 Mo. 453, affirmed.

Petition for mandamus.

Crawley, and *Winslow*, for relator.

BLISS, Judge, delivered the opinion of the court.

The city of Brunswick, under authority of plaintiff's charter (Adj. Sess. Acts 1863, p. 485), issued to the plaintiff its bonds to the amount of \$25,000, and received certificates of stock therefor. The company negotiated the bonds, and upon the

Salisbury v. Renick et al.

interest coupons falling due, the city authorities refused to provide for their payment. To save the credit of the bonds and of the company, the company provides temporarily for the payment of the coupons, and asks for a writ of *mandamus* upon the defendants, commanding them to make provision for the payment of said coupons, and also for those falling due. An alternative writ was issued, returnable the 8th of November of this term, which was duly served, but defendants make no reply.

The default of defendants admits the facts, and the only questions that affect the legality of the subscription and bonds were decided in State *ex rel.* Mo. & Miss. R.R. Co. v. Macon County Court, 41 Mo. 453.

A peremptory writ will issue. The other judges concur.

THOMAS SALISBURY, Respondent, v. RENICK & PETERSON, Appellants.

1. *Bills and notes — Presentment — Reasonable time.*—The general rule in regard to presentment is that the bill must be presented within a reasonable time; and what will be a reasonable time must depend upon all the circumstances of each particular case.
2. *Bills and notes — Presentment — Reasonable time.*—A. purchased of B., at St. Louis, on the 9th of June, a bill of exchange on C., in New York, with the understanding that the bill might be cashed by A. while in New York, or returned and repurchased by B. at the option of A. No limit of time for the return of the bill was fixed upon. It was never presented to C., but was returned, for payment, to B. the 16th of October. Meanwhile, in August, C. had failed, and B. refused payment. *Held*, that the bill was not presented to B. within a reasonable time, and that he was not liable.
3. *Bills and notes — Agreement to return draft to drawer, if not used — Reasonable time.*—Where no time is specified within which a bill of exchange shall be returned to the drawer if not used, the law will imply a reasonable time.
4. *Bills and notes — Promise to pay, with full knowledge of laches — Effect of.*—The law seems to be well settled in this country that where no demand for the payment of a bill of exchange has been made, or notice of non-payment given, a promise to pay after maturity, with full knowledge of such laches, is binding on the party promising, and removes entirely the effect of any negligence in making the demand or in giving the notice.

Salisbury v. Renick et al.

Appeal from St. Louis Circuit Court.

T. T. Gantt, for appellants, relied upon *Commercial Bank of Albany v. Clark*, 28 Verm. 325, 329; *Duvall v. Farmers' Bank*, 9 Gill & J. 31; *Commercial Bank v. Hughes*, 17 Wend. 98-9; *Breed v. Hillhouse*, 7 Conn. 523; *Hall v. Freeman*, 2 Nott & McC. 479; *Low v. Howard*, 10 Cush. 163; *Conroy v. Warren*, 3 Johns. Cas., per Thompson, J., 262, and Kent, J., 264; *Story on Bills*, § 291 *et seq.*; *Byles on Bills*, 150, 159 *et seq.*; *Sice v. Cunningham*, 1 Cow. 397, 406; *Miller v. Hackley*, 5 Johns. 385; *Griffin v. Goff*, 12 Johns. 423; *Pars. on Bills*, 621, note z; *Story on Bills*, § 320; *Mogadara v. Holt*, 1 Shower, 318; *Borradale v. Low*, 6 Taunton, 93 *et seq.*; *Lundie v. Robertson*, 7 East. 231; *Gibbon v. Coggen*, 2 Campb. 188; *Taylor v. Jones*, 2 Camp. 105; *Blesard v. Hirst et al.*, 5 Bur. 2,670.

Hill & Jewett, for respondent.

WAGNER, Judge, delivered the opinion of the court.

It appears from the record that on the 9th day of June, 1857, Wm. Salisbury, plaintiff's assignor, purchased from defendants, who were bankers doing business in St. Louis, a bill of exchange on New York for \$3,200. The bill was payable at sight, and directed to Beebe & Co., defendants' correspondents in the latter city. On the 24th day of August, 1857, the house of Beebe & Co. became bankrupt, and stopped payment, having in their hands a large amount of funds belonging to defendants; and it is admitted by the facts in the case, that from the time the bill was drawn up to the time of the failure of Beebe & Co., they had in their hands funds belonging to the defendants in amount greatly in excess of the bill. The bill was never presented for payment, and in October of the same year Salisbury presented the same to the defendants and demanded that they should pay the money thereon.

The petition avers that it was agreed and understood at the time the bill was purchased that if Salisbury, who was going to Ohio on business, should not need the money, the defendants

Salisbury v. Renick et al.

would take back the bill, charging the usual rates of exchange. There is a further allegation that when the bill was presented for payment in October the defendants promised to take up and pay the same.

The answer contains an express denial of the allegations in the petition. The evidence is conflicting; and, under the instructions of the court, the jury found-for the plaintiff.

It is not my province to comment on the evidence; but the law, as laid down by the court in its instruction, must be examined to see whether there was any misdirection. The first instruction given for the plaintiff tells the jury that if they believe from the evidence that at the time the draft was bought there was an understanding or agreement between Wm. Salisbury and either of the defendants that said Salisbury might do as he pleased about using or presenting the draft, and that if he did not want to use it, he might return it to the defendants, and they would pay it, deducting exchange or expenses, then defendants are liable, though said draft was not presented to Beebe & Co., if the draft was returned within a reasonable time to defendants. The general rule in regard to presentment is that the bill must be presented within a reasonable time; and what will be a reasonable time must depend upon all the circumstances of each particular case. (Story on Bills, § 231, and cases cited.)

Where a bill is payable at sight, or a certain number of days after sight, if the holder keeps it in his own possession for an unreasonable time, and thus locks it up from circulation, he makes the bill his own, and will have no remedy against any of the other antecedent parties upon the bill, from or through whom he derived his title. (Story on Bills.)

In the case of *Linville et al. v. Welch*, 29 Mo. 203, Ellis & Sturgis, bankers in Cincinnati, drew a bill of exchange in favor of Welch, upon the banking house of Loker, Renick & Co., St. Louis. The bill was dated October 24, 1854, and afterwards indorsed by Welch to Linville. From the notary's entry on the face of the bill and the protest, it appeared that the bill or draft was protested for non-payment on the 13th of December, 1854. On the day of the protest the notary sent notice of protest to the

indorsers. It appeared that the plaintiffs sent the bill to their agent, Matthews, at St. Louis, Mo., and he on the 17th of November, 1854, presented it to Loker, Renick & Co., who refused to pay the same. The banking house of Ellis & Sturgis had failed November 7, 1854. The agent returned the bill or draft to the plaintiffs, who sent the same back to the agent to present again. He did so on the 13th of December, and the bill was protested on that day for non-payment. There was no protest made on the first refusal of payment, though there was evidence that the defendant had notice of the first refusal. At the trial in the Circuit Court the jury were instructed that if they believed from the evidence in the cause that the bill was presented to Loker, Renick & Co. for payment in a reasonable time, that payment was demanded and refused, and that the defendant was notified of the presentment and refused to pay in a reasonable time, then they should find for the plaintiffs. The jury found for the plaintiffs, and on appeal to this court the judgment was reversed, Napton, J., speaking for the court, saying: "In relation to the presentment to Loker, Renick & Co., the law requires this to be made in a reasonable time, and what this will be must depend upon the circumstances of the case. That the presentation made in this case by Matthews, on the 13th of December, was not within reasonable time, would seem to follow from the fact that a previous presentation had been made on the 17th of November."

Although the case just cited and the one at bar are not entirely parallel or analogous, yet the former furnishes an aid as indicating how far courts will go in deciding upon the question of reasonable time. The court there held that a delay of less than seven weeks was unreasonable, and discharged the indorser. Here there was a delay of four months. There the bill was indorsed and put in circulation; here it was kept in possession and locked up. For upwards of two months after it was issued the drawees were perfectly solvent, and it would have been cashed on presentation; then they went down temporarily, dragging the drawers with them.

Salisbury v. Renick et al.

We are now to consider what effect is to be ascribed to the understanding between Salisbury and defendants at the time the bill was drawn. No time was specified within which the bill should be returned if not used; and in that case the law would imply a reasonable time. Reasonable time can not be defined with any certainty; it is such time as the law requires, but it must be varied to suit the exigencies of each particular case as they arise. A person buying a bill of exchange, contemplating a trip to the western territories, for the transaction of business, with the understanding that it should be taken back or repurchased on his return, if not needed, would be allowed a much greater length of time to return the bill than one going to Illinois or Ohio, where communication is rapid, and a few days sufficient to make the trip. The damage in this case was done by holding up the bill from the 9th of June till the 24th of August, a period of more than ten weeks. It was certainly not within the contemplation of the parties, at the time the agreement was made (if there was any), that the bill should be taken back at all events, regardless of the utter want of diligence and palpable negligence of one of the parties, by which the other sustained loss. In such a case there would be a complete want of mutuality, and it could not have been the intention of the parties at the time. Under the circumstances, I do not think that the presentment was made within a reasonable time, and it follows that the first instruction should not have been given.

The second instruction given the jury at the request of the plaintiff is as follows: "If the jury believe from the evidence that on or about the 16th of October, 1857, Wm. Salisbury returned the draft and called upon defendants to take it up, and that either of the defendants, knowing at the time that the draft had not been presented to Beebe & Co., and that Beebe & Co. had failed, promised said Wm. Salisbury, or Thos. L. Salisbury, after he became the owner of the draft, that they would pay the draft, then plaintiff is entitled to recover, though said draft never was presented to Beebe & Co."

In the English courts there has been great fluctuation and uncertainty on this subject, but the principle seems to be well

Salisbury v. Renick et al.

settled in this country that where no demand has been made or notice given, a promise to pay, after maturity, made with a full knowledge of such laches, is binding on the party promising, and removes entirely the effect of any negligence in making the demand or in giving the notice. (See 1 Pars. on N. & B. 595, where the cases are collected.)

Where, in a case in the Circuit Court, the judge charged the jury that if, "after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant can not now set up, as a defense to said note, a want of such demand or notice," the Supreme Court of the United States held the charge correct. (*Sigerson v. Matthews*, 20 How. 464; see also *Thornton v. Wynn*, 12 Wheat. 183.)

In *Harvey v. Troupe*, 23 Miss. 538, the court says: "A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he has been released from liability on the bill by the neglect of the holder, will operate as a waiver and bind the party who makes it for the payment of the whole bill."

Deeming the law to be settled in accordance with the foregoing views, we see nothing objectionable in the instruction. This disposes of the case wholly, and it is unnecessary to examine or comment on the action of the court in giving and refusing instructions for the defendants.

As the first instruction was erroneous, and it is impossible to tell on which one the jury predicated their verdict, the cause will be reversed and remanded for a new trial in accordance with the views herein expressed.

Reversed and remanded. The other judges concur.

Aubuchon et al. v. Bender et al.

PAUL AUBUCHON *et al.*, Appellants, v. CHARLES C. BENDER
et al., Respondents.

1. *Conveyances — Notice — Prior unrecorded deed — Consideration.* — To entitle a grantee of land, without notice, to protection against a prior unreserved conveyance, he must have parted with something of value as a consideration of the deed.
2. *Conveyances — Consideration — Record — Relinquishment of dower.* — The grantee, without notice, in a duly recorded deed, the sole consideration for which was the love and affection of the grantor, will not hold as against a prior unrecorded deed of the same property, the consideration of which was love and affection, and also the relinquishment of dower by the wife of the grantor.
3. *Conveyances — Life estate — Remainder — Revocation — New uses.* — The grantor of land seized to his own use for life, can do nothing, while in possession, to impair an estate created by him in remainder, and, not having reserved the power, can neither revoke the estate in remainder nor declare new uses.
4. *Conveyances — Covenant — Contingent and vested remainders created by one deed.* — A covenant that creates both a vested and contingent remainder is unusual, but there seems to be no principle of law to prevent it.
5. *Conveyances — Covenant to stand seized to uses — Vested and contingent remainders.* — By the terms of a deed the grantor was to stand seized of certain property to his own use during his life; and, after his death, his title was to vest in five children in the deed mentioned, "and such other children in lawful wedlock by him begotten, as should be living at the time of his death." After making said deed, the grantor re-married. *Held*, that the children named in the deed had a vested, and those born of the subsequent marriage a contingent, remainder in the property.
6. *Conveyances — Contingent remainders — Child en ventre sa mere.* — A child unborn will now not only inherit all manner of estates, but take remainders, whether vested or contingent, as though living when the particular estate determined. The statute of 10 and 11, William III, ch. 16, adopted in this State in the revision of 1845 (p. 220, § 9), was but an affirmation of what had already become the law.
7. *Practice, Civil — Actions — Parties — Question who are, not settled by agreement of counsel.* — The question who are the heirs of a party to a suit can not be set at rest by a statement of facts agreed upon by counsel in the case.

Appeal from St. Louis Circuit Court.

Harding & Crane, for appellants.

I. Covenant to stand seized is one of the forms of conveyance upon which the statute of uses operates. (Burton, 21 Law Lib. 19, § 136; 4 Kent Com. 492.) The deed of April 23, 1844, is a covenant to stand seized. (Roe v. Tranmarr, Willes, 682.)

II. Both the deeds are voluntary conveyances, neither of them being to *bona fide* purchasers for a valuable consideration. The registry act, therefore, does not apply. (4 Kent, 456; Doe v. James, 16 East. 212, new ed. 406; Paul v. Fulton, 25 Mo. 157, 163; Strickland v. McCormick, 14 Mo. 166.) The statute applies only to purchasers and mortgagers. (Rev. Stat. 1835, p. 123, § 31; 4 Kent, 295; 2 Blackst. Com. 335.)

III. The five children who are named in the deed took vested remainders. (2 Sanders' Uses and Trusts, 34, and notes; 4 Kent, 202, 205, and note c; Right v. Cuba, 4 B. & C. 866; 2 Washb. 512, § 20; 2 *id.* 229, 230, note 2.)

IV. The quantity of the estate vested in the five children named in the deed was liable to diminution by the subsequent birth of other children of the grantor by Cecile Clement, and not otherwise.

V. The two children of the second *ventre* who died in the lifetime of the grantor, take nothing, because there were children of the class living at the time of the grantor's death. (2 Turner, C. R. 334 *et seq.*; Harrison v. Forman, 5 Ves. 307; Sturges v. Pearson, 4 Mad. 412.)

VI. The child of the second marriage (Virginia), who was born after the death of the grantor, is not entitled, because she was not *in esse* when the particular state determined. (2 Blackst. Com. 169; Butler's Notes to Coke Lit. 298; 1 Turner, C. R. 308; Hill. on Trustees, Wharton, 267, 377,)

Gardiner, and *Garesche & Mead*, for respondents.

I. The interest of the children was not vested, but contingent—dependent on their survivorship of the father. (Hempstead v. Jackson, 20 Ala. 193.)

II. Virginia Dantin, though a posthumous child, certainly inherited. (1 Blackst. Com. § 130; 2 Kent's Com. § 424; 4 Kent's Com. 248, 412.)

BLISS, Judge, delivered the opinion of the court.

This is an action of ejectment, which was originally brought in the Land Court, but transferred to the Circuit Court, to recover

Aubuchon et al. v. Bender et al.

possession of lot six, in block one, in H. G. Soulard's addition to the city of St. Louis. The wife of Paul Aubuchon, formerly the wife of Adolph Dantin, and the other plaintiffs, children of said Adolph by said wife, claim to hold the property by virtue of a covenant to stand seized to uses executed by said Adolph and wife, then Cecile Dantin (named in the deed as Cecile Clement), April 23, 1844. It appears that about the time of the execution of this deed, the said Adolph commenced proceedings against Cecile for a divorce, which he afterward obtained, and that the original defendant, Amanda Dantin, was the second wife of said Adolph, and held under a subsequent deed, and also as devisee; but she died pending the suit, and it was revived against Bender, as her executor, and her four minor children. The plaintiffs recovered judgment in the Circuit Court for an interest in the lot in common with the defendants, and for damages and monthly rents, from which both parties appealed, and almost the only questions raised by the record pertain to the validity of the deed, to its construction, and its legal effect.

The deed, after reciting the seizin in fee of said Adolph in two parcels of land, to-wit: First, in a lot in the town of St. Ferdinand, describing it; and, second, in the lot in controversy, describing it, proceeds as follows: "Now, therefore, the said Adolph Dantin, being free from debt, desires to make provision for his wife and children by limiting the real estate aforesaid to certain uses and trusts, in consideration whereof he declares and says he is lawfully married to Cecile Clement, his present wife, by whom he has five children now living, to-wit: Adolph, Francois, Cecile, Therese, and Louise, the oldest of said children, Cecile, being about twelve years of age. And in further consideration of the premises the said Adolph doth grant, agree, declare, and say, that from henceforward he will be and stand seized in fee simple of the lot of ground first above described, and the buildings thereon situated, to the sole and separate use, benefit, and usufruct of his wife, the said Cecile Clement, during her natural life, and after her death for the use, benefit and usufruct of the five children of said Cecile above named, and their heirs, and none others, so that during the lifetime and after the death

Aubuchon et al. v. Bender et al.

of said Cecile, her said children above named may enjoy, use and dispose of the rents, issues and profits of the said lot of ground and the improvements thereon, freely and without molestation or control of the said Adolph or any other person whomsoever, she, the said Cecile Clement, paying all taxes, rates, charges, and assessments on said lot of ground and improvements during her lifetime, but having no power to sell, mortgage, or in any wise encumber the same. And for the same consideration, the said Adolph does grant, agree, declare, and say, that from henceforth he will be and stand seized in fee simple of the lot of ground secondly above described, with the appurtenances, for his own use during his natural life, and after his death the use, benefit, usufruct and title to the same shall revert to and vest in his said five children above named, and such other children in lawful wedlock by him begotten as shall be living at the time of his death, and their heirs, without the power on the part of said Adolph to sell, alienate, in any wise encumber, or dispose of said lot of ground and appurtenances, for a period longer than his natural life. And in order to avoid any conflict or litigation growing out of this [writing illegible], Cecile, wife of said Adolph, assents hereto and relinquishes her dower in the said lot of ground secondly herein described, and joins in the execution of this deed." The deed was duly executed April 18, 1844, and was not acknowledged but witnessed by two witnesses, and by them proved under the statute, September 30, 1846, and was recorded December 19, 1859.

Adolph Dantin obtained his divorce in May, 1844, and, four or five years after, married Amanda, by whom were born his other children, survivors of whom are defendants. In July, 1857, he deeded to one Castello the north half of the premises in controversy, in trust for his said wife Amanda during her life, remainder to their joint issue, which deed was immediately acknowledged and recorded. In 1853 the said Adolph made his will, by which he gives everything to his wife Amanda during her life and widowhood, remainder to her children by him, except a life-interest to his divorced wife in another parcel of land; and Amanda Dantin makes her will, giving everything to her children.

Aubuchon et al. v. Bender et al.

Adolph Dantin died in December, 1859, and this suit was commenced the next year.

The right of the plaintiffs to anything depends, in the first instance, upon the validity of the covenant to stand seized, executed by Adolph and Cecile Dantin; for, if that deed fails, their right is cut off by the deed in trust to Castello, and the will. This first instrument is attacked upon the ground that it was not put on record until 1859, about the time of, perhaps a little after, the death of the covenantor. No evidence was offered tending to prove any fraud or deception in procuring it; but it seems to have been a deliberate settlement by and between the parties as to the two lots mentioned, giving one to the wife during her life, remainder to their children, and the other to the husband during his life, remainder to his children. The fact that he obtained a divorce in a short time, swearing to his charges against her on the very day of executing the instrument, and the fact that she made no opposition to his application, show that this division of the property and settlement upon children was made in view of their probable separation. We have only then to consider its validity as affected by being withheld from record.

At common law there was no obligation to put upon record a conveyance affecting the title of land. But the duty of registration is now imposed upon the grantee, or the person to whom, or for whose use, the conveyance or covenant is made; and, as in all other cases where a duty is imposed, he who neglects it should suffer the consequences. The object of the requirement is to compel an exhibit of titles to facilitate transfers, but principally to guard purchasers against imposition; and hence, if the prior deed is not recorded, a subsequent buyer, for good consideration, without notice, will be protected. This protection, always thrown around an innocent purchaser, and to which our statute also expressly entitles him, is founded on the broadest equity. He receives it not because the prior deed is invalid in itself—the duty of recording it is not enforced by any such penalty—but because justice will not suffer a person who omits a plain duty to set up a claim against one who has been led by that omission to invest his money in what he supposed his vendor had a right to

Aubuchon et al. v. Bender et al.

sell. But, to entitle him to such protection, he must have parted with something of value, otherwise he is not injured; and such is the spirit, if not the letter, of the statute, and such has been its uniform interpretation. In *Davis v. Ownby*, 14 Mo., on page 176, the judge says: "There must be title for value under the grantor, to admit the question [want of record] being raised;" and in *McCamant v. Patterson*, 39 Mo., on page 110, almost the same language is used. The covenant to stand seized, of 1844, operated as a deed of gift of the remainder of the estate in controversy to the children of the covenantor. The trust deed to Castello, in 1857, would have operated as a gift of another remainder, founded upon a different estate, to a part of his children. In addition to the laudable desire to make provision for his children, moving the execution of both the instruments, there is to the first the additional consideration of release of dower by his then wife, Cecile, for the benefit of his children, while to the second there is no other consideration. The beneficiaries of the second instrument, holding by gift merely, are in no better condition than would be an heir or devisee, and stand in the shoes of their grantor, and the instrument under which they claim could have no other effect than to assign his life estate. Still less could the devisees of the will, either of Adolph Dantin or of Amanda, his wife, avail themselves of this want of registration.

To the suggestions of defendants' counsel in relation to presumptions and limitations arising from the adverse possession of the covenantor, Adolph Dantin, it is only necessary to say that he never held adverse possession, but was possessed according to the terms of the covenant upon which this suit is based, being seized to his own use for life. While so in, he could do nothing to impair the estate in remainder; and, not having reserved the power, he could neither revoke nor declare new uses. (2 Blackst. Com. 335.)

There is no defect charged upon the covenant itself, of 1844, and holding it not to be invalid for want of registration, nor from the subsequent acts of the covenantor, we have only to consider its legal effect; and the first question is whether the remainder is vested or contingent, as it becomes important in determining

the rights and quantity of estate held by the different claimants. The particular estate that supports the remainder is that of the covenantor, Adolph Dantin, which is a life estate, and if the persons who are to enter at his death, are fixed and determined, then the remainder is vested in them, as much so as would have been the fee if the grant were to them without the intervention of the particular estate. Does the instrument ascertain and declare who are the remainder-men? To answer this question we must find the intention of the covenantor as evidenced by his deed. Firstly, he declares that he desires to make provision for his wife and children; and as to the first piece of property, there can be no doubt that the remainder is vested, and became at once the absolute property of the children named in the covenant.

But the disposition in this respect of the second lot, and which is the one in dispute, is not so clear. Had the provision been that the use, etc., should "revert and vest in said five children above named, and such other children as shall in lawful wedlock be by him begotten," leaving out the words of qualification following, "as shall be living at the time of his death," the intention would be plain to place all born and to be born upon the same footing, and the remainder would vest at once in the living children and open up to receive any that might be born, and vest in them as soon as born. (4 Kent, 205.) Or had the language been, "shall revert and vest in such of his said five children above named, and such other children in lawful wedlock by him begotten, as shall be living at the time of his death," the remainder would be contingent as to all the persons, and could not vest until his death had determined in whom it should vest. (2 Blackst. Com. 170.) But if we follow the plain language of the deed, the remainder seems to be both vested and contingent—vested as to the children of the covenantor then living, and contingent as to those who were to come after.

A covenant that creates both a vested and contingent remainder in the same property is doubtless unusual, but I know of no principle of law to prevent it. No practical inconvenience can follow; for when the remainder-men take possession the contingency is gone, and the whole remainder becomes vested. Nor is

Aubuchon et al. v. Bender et al.

it more unreasonable in theory than for a contingency to become a vested interest by the birth of the only remainder-man—as in a gift to A. for life, remainder to the eldest son of B., who has no son—or the opening of a vested remainder and reinvesting it at the birth of each additional remainder-man. The whole estate is purely ideal until the right of possession follows the determination of the particular estate, and it is only important to determine the question in the case at bar in reference to the rights of the heirs of the children of the covenantor.

The record shows that Francois, one of the children named in the deed as then living, died in 1845, and as his interest in the remainder vested at the date of the deed, it goes to his heirs. It also shows that Amanda, second wife of the covenantor, bore him six children, of whom four were living at his death. The interest of these children, not being vested, but contingent upon birth and survivorship, that of the two who died never attached, and consequently did not go to their heirs, hence these four children take by virtue of the covenant the proportion of four to five, or four-ninths of the property. But they take a small interest in addition. Francois, as we have seen, died in 1845, and left as his heirs his father and mother and four brothers and sisters. Thus one-sixth of his interest in the remainder coming to the father, was by him, through his deed to Castello, and his will, conveyed to the children of Amanda; so, in addition to the four-ninths, these four children jointly are entitled to one-sixth of one-fifth of five-ninths, or one fifty-fourth, leaving also for the plaintiff, Mrs. Aubuchon, one fifty-fourth as heir of Francois, and to her four surviving children, jointly, four-ninths in their own right, and four fifty-fourths as heirs of Francois.

The plaintiffs object to this distribution upon various grounds. First, they claim that the estate which vested in the five living children of the covenantor, by his deed, was subject to diminution only by the subsequent birth of children by Cecile Clement, and not by the birth of children from any subsequent marriage. But I can see no warrant, either in reason or authority, for this claim. Our only guide in the matter is the intention of the covenantor, and that seems plain. It is urged that the expressed object “to

make provision for his wife and children" controls the words of the covenant. The object of an instrument is always to be considered, especially if there be any doubt as to its construction. But there can be no reasonable doubt in the present case, and if there were, the construction given it abundantly secures the object. Two parcels of real estate were embraced; a life estate in one was given to his wife, remainder to his living children by her. In the other the life estate was invested in him, with a remainder to these same children, and "such others to be by him begotten, as shall be living at the time of his death." The wife and living children are abundantly provided for according to the specified object, and a contingent interest reserved in one of the lots for any possible future children, is in no way inconsistent with that provision.

Secondly, it appears that one of the children of Amanda Dantin, was born after the death of her husband, and plaintiffs also claim that he has no interest in the remainder, as he was not living at the time of his father's death. In the days when subtleties of statement were suffered to control rights of property and inheritance, it was held that a posthumous child, not being *in esse*, could not take a contingent remainder, unless an intermediate estate was provided upon which it could rest. But the practical sense of modern jurisprudence has so sifted that vast pile of wisdom and rubbish, comprising the common law of tenures, that justice and reason are no longer the slaves of technical consistency. A child unborn will now not only inherit all manner of estates, but take remainders, whether vested or contingent, as though living when the particular estate determined; and it matters not whether, in the technical statement of the case, we say that the estate was suspended until his birth, or that it vested *en ventre sa mere*, or vested in the person next entitled to it, and divested and reinvested at his birth, it is settled by adjudication as well as legislation that the remainder-man shall not be deprived of his estate, although born after the determination of the particular estate.

The plaintiffs claim that this view is only sustained by the statute of 10 and 11, William III, ch. 16, which statute was not

Aubuchon et al. v. Bender et al.

adopted in Missouri, until the revision of 1845 (page 220, § 9), which was after the execution of the covenant under which the plaintiffs claim. But this statute when adopted by us was but an affirmance of what had already become the law. The history of its original adoption shows one the struggles for which our jurisprudence has been distinguished. The King's Bench, in *Reeve v. Long*, 1 Salk. 227, held, as the law was then understood, that a contingent remainder must vest during the particular estate, or *eo instanti* that it determines, and consequently that upon a devise to H. L. for life, remainder to his first son, in tail, etc., and in default to R. L., etc., if H. L. should die, leaving his wife *en ventre* with a son, R. L. might enter and hold to the exclusion of the posthumous son. The case went to the House of Lords where, under the lead, as Lord Roselin informs us, of the learned Somers, the judgment was reversed, to the great dissatisfaction of the common-law judges. (*Reeve v. Long*, 2 Levinz, 408.) The statute of William III, was soon after enacted, to settle, as is said, the question, but really it would seem to extend to grants and covenants the principle of the decision which had been made in reference to devisees; for the courts now hold the posthumous child entitled to his remainder, whether created by will or deed. (See notes to 2 Sharswood's Blackstone, 169, and cases and authorities there cited.) The principle is broadly and clearly stated by Chancellor Walworth in *Marcellis v. Thalhimer*, 2 Paige, 39, 40. The court there says: "It is at this day a well settled rule of law relative to successions, and to most other cases in relation to infants, that a child *en ventre sa mere*, as to every purpose where it is for the benefit of the child, is to be considered *in esse*." "It was for some time doubted whether such a child could take a contingent remainder before its birth. The question was finally settled," etc., citing *Reeve v. Long*. "It is now settled both in England and here that the infant, after conception, but before its birth, is *in esse*, for the purpose of taking the remainder or any other estate or interest which is for the benefit of the infant."

It is seen that Francois, son of Cecile, died early, and the plaintiffs' counsel object to considering his father as one of his

State ex rel. Pittman et al. v. Adams et al.

heirs, because in the agreed statement of facts, it is admitted that the plaintiffs are his heirs. No agreed statement of facts can fix a conclusion of law. The relationship and death are facts to be admitted, but who were his heirs is a question of law which the court is bound to declare. Hence, notwithstanding the inadvertent concession of defendants' counsel, the father was one of his heirs, and his interest as such should pass as before indicated.

The only remaining question is that of rents and damages, to the payment of which the infants, it is claimed, are not liable. The amount of damages and monthly rents for which the defendants are liable depends upon the proportion of their estate, and should be divided as follows: the executor should pay out of the estate of Amanda Dantin all that had accrued at her death. Since her death, her heirs defending are supposed to be in possession and should be responsible for the proportion of the plaintiffs' interest in the possession. This is the principle upon which the judgment for damages was rendered below, although I find the proportion of the plaintiffs' interest adjudged to them in the lot a little too large.

The judgment is therefore reversed and the cause remanded for judgment according to the principles of this opinion. The other judges concur.

STATE *ex rel.* D. K. PITTMAN *et al.*, Plaintiffs in Error, *v.* JOHN ADAMS *et al.*, Defendants in Error.

1. *Corporations — St. Charles College — Amendment of charter impaired obligation of contract.* — By the charter of "St. Charles College," it was required to be "an institution, purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable or liberal-minded persons, whatever may be their religious opinions." The amendment of the charter, approved February 6, 1847 (Sess. Acts 1847, p. 226), provided that "the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South" should "be requisite in filling all vacancies in the board; upon the conference affording to the board satisfactory assurances for the maintenance and endowment of the college." *Held*, that the amendment, by requiring the

State ex rel. Pittman et al. v. Adams et al.

concurrence in the choice of curators, of an ecclesiastical body representing one of the religious denominations of the State, endangered, in this regard, the principles of the foundation; and, even if it did not, it changed the character of the administrators of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impaired the contract upon which he advanced it.

2. *Corporations, moneyed and charitable—Stockholders—Visitors.*—In moneyed corporations, the trustees have no general powers. They are simply the agents of the shareholders, and under their control. The law of visitation, as applied to charities has no application to them. But in eleemosynary corporations there are no stockholders, and regulations that ordinarily are made by them, and disputes that are submitted to the courts, are made and decided by those intrusted with the visitatorial power.
3. *Corporations—Moneyed and eleemosynary—Visitors—Duties of.*—In this country, moneyed corporations composed of shareholders, for whose use and benefit the charter is granted, may, in general, accept amendments thereto. But in charities the corporators are not the owners of the fund; neither is it held for their use. Their consent would not affect their own property but that of others, and their office of visitors, so far from giving them power to authorize any change in its management and control, contrary to the will of the founder, imposes upon them rather the obligation of seeing that that will is made paramount.
4. *Corporations—Visitors may consent to legislative change, when.*—Various changes may be found necessary in furtherance of the objects of a charitable institution which its visitors should have authority to make, or assent to, if such objects require an amendment to the charter. But if the general power of consent to legislative amendments is lodged in the directors or curators, there is no security whatever in eleemosynary grants.
5. *Corporations, eleemosynary—Legislative amendments—Curators—Consent of.*—The curators of an eleemosynary institution, the grant of which by the Legislature is absolute, subject only to the conditions imposed, have no power over the charter, but on the contrary it is their creator and their absolute rule of conduct. The beneficial interest in the charity fund belongs neither to them nor the State, but to the beneficiaries only, who, from the nature of the case, can not consent to any changes in the charter. Hence, its essential conditions are permanent, so far as change depends upon consent, and the acceptance of a legislative amendment to the charter of such an institution by its board of curators gives it no validity.
6. *Corporations—Officers, removal of, for disloyalty—Act of March 23, 1863, validity of.*—The Legislature of this State, pending the late contest, had power to take measures to remove from the management of corporations of a public nature those who came within the purview of the oath commonly called the convention oath. (*Vide* act of March 23, 1863, Sess. Acts 1863, p. 12.) The act was not a violation of the contract embraced in the charter, for fidelity to the State is embraced in every such contract. The duty of loyalty is antecedent, perpetual, and paramount; and, in granting a charter, the State can make no engagement to dispense with that duty.

State ex rel. Pittman et al. v. Adams et al.

7. *Act of December 11, 1863, in the nature of an act of attainder—Article II, of constitution in force in 1863.*—The act of December 11, 1863 (Adj. Sess. Acts 1863, p. 645), ousting the board of curators of St. Charles College for having failed to take and subscribe the oath required by the act of March 23 (Sess. Acts 1863, p. 12), assumed, without judicial findings, that the board of curators had forfeited their position; it cut off any defenses which they might make upon a trial of their right to office, declared vacancies which had not been created, and proceeded to fill them. It was, therefore, in the nature of a bill of attainder, and equally unjust and odious, and unknown to our jurisprudence. Such judicial action was also expressly guarded against by article II of constitution, in force in 1863, which prohibited the union of the legislative and judicial power.
8. *Constitution—Act of Legislature declaring forfeiture—Legislative judgments.*—The recitals in a statute will in general be taken as correct. But an act declaring a forfeiture, if outside of legislative authority, can not be strengthened by reciting facts that might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment, but the question of forfeiture is strictly judicial. And the Legislature can not constitutionally know either that the facts exist or their legal effect.
9. *Corporations—Powers of amotion—Trial essential before amotion.*—The power of amotion is judicial in its character, and generally exercised by the courts of the land, though it may be given to the corporation by its charter, and, even if the charter is silent, an officer or corporator, in some classes of corporations, may be expelled for sufficient cause. But it is essential, in every case, that charges be made, a trial had, and that the accused be notified and have a full opportunity for defense.
10. *Act of March 23, 1863, created no vacancy in board of curators of St. Charles College.*—The act of March 23, 1863 (Sess. Acts 1863, p. 12), did not, *proprio vigore*, create any vacancy in the board of curators of St. Charles College, nor did it purport to do so.

Error to Sixth District Court.

E. A. Lewis, for plaintiffs in error.

I. The act of December 11, 1863, was inoperative and conferred no title to the curatorship on the defendants in this case. (Fletcher v. Peck, 6 Cranch, 87, 136; State v. Wilson, 7 Cranch, 164; Pawlet v. Clark, 9 Cranch, 292; 1 Kyd on Corporations, 16; Wales v. Stetson, 2 Mass. 143, 146; Terret v. Taylor, 9 Cranch, 43.)

II. If the amendment of 1847 was invalid for any cause, it was simply a nullity. It had no operation for any purpose, and,

State ex rel. Pittman et al. v. Adams et al.

least of all, for vitiating the original charter or effecting a forfeiture.

III. If by any means a forfeiture was inaugurated, the Legislature had no power to proceed upon it as a consummation, until the fact had been judicially ascertained and adjudged.

Thomas Bruere, for defendants in error.

I. The act of December 11, 1863, is valid and effectual to vest the curatorship of St. Charles College in the defendants.

II. The act of February 6, 1847, and the acceptance of said act by relators, the filling of vacancies in the board of curators, and the appointment of most of said relators as curators, with the concurrence of the Methodist Episcopal Church South, were violations of the original charter.

BLISS, Judge, delivered the opinion of the court.

The circuit attorney of the 19th judicial circuit filed in the St. Charles Circuit Court an information, in the nature of a *quo warranto*, on the relation of David K. Pittman, Andrew Monroe, Trusten Polk, Asa N. Overall, Daniel A. Griffith, Samuel Overall, Norman Lackland, Lloyd Dorsay, Wrenshall D. Fielding, John A. Talley, James S. M. Gray, Thos. W. Cunningham, James Campbell, Robert B. Frazier, Richard E. Bland, Dennis McDonald, John W. Robinson, John Atkinson, Joseph Boyle, Enoch M. Marvin, Edward A. Lewis, and David K. McAnally, against John Adams, George A. Buckner, Peter Hansen, Robert Bailey, Sr., Theodore Bruere, Nathaniel Reid, Henry Borgman, Benjamin Emmons, Jr., W. B. Adams, James H. Robinson, Henry A. Clover, Charles D. Drake, Dr. M. L. Linton, Dr. John Conzelman, and Frederick Muench, charging them with usurping the office of curators of the St. Charles College, and alleging that the relators are rightfully entitled to the office.

The relation sets forth, in full, the charter of the college, granted February 3, 1837, which recites that the institution was founded and has been supported at the private expense of George Collier; that, for the purpose of giving it permanence, elevation, and extensive usefulness, he desires, with the aid of others, to

State ex rel. Pittman et al. v. Adams et al.

endow it and place it under the direction of a board of curators, who shall conduct it on the principle of its foundation, namely: as an institution purely literary, affording instruction in ancient and modern languages, the sciences and the liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable, liberal-minded persons, whatever may be their religious opinions; and enacts that George Collier and twenty-eight other persons (naming them), including said Trusten Polk, David K. Pittman, and Andrew Monroe, and their successors, become a body corporate under the name of the "Board of Curators of St. Charles College." The charter provides for the organization of the board, twelve constituting a quorum, for filling vacancies by the board, expelling members for cause, and gives other necessary and usual powers for the ends of the organization.

The relators set forth an amendment to the charter, approved February 6, 1847, changing, somewhat, the character of the institution, by placing it under ecclesiastical influence or control, which amendment provides that the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South shall be requisite in filling all vacancies in the board, upon the Conference affording to the board satisfactory assurances for the maintenance and endowment of the college; and they proceed to state the regular organization of the board; that it met and transacted business regularly under the original act of incorporation and its amendment until their ouster; and particularly that on the 21st of December, 1850, the amendment was regularly accepted by the board.

They also state that, except the said Pittman, Monroe, and Polk, who were named in the original charter, all the other relators were duly elected members of the board to fill vacancies as they occurred, specially setting out the time of each election, and that all the elections after February 6, 1847, were with the concurrence of the Missouri Conference of the M. E. Church South; that they all took upon themselves the duties of their office, continued to hold and enjoy the same until the wrongful

State ex rel. Pittman et al. v. Adams et al.

usurpation of defendants, and are still entitled to the same. The relation charges that the defendants, on the first of January, 1864, usurped and intruded into the office of members of the board of curators, and have ever since unlawfully held the same under color of authority granted by the act of the General Assembly, approved December 11, 1863, amendatory of the original act of incorporation; avers that the board never accepted said amendment to the charter; that it is in conflict with the original act and its former amendment, and with the constitution of the United States, and is null and void. The preamble to the last-mentioned act recites that a large majority of the members of the board of curators of St. Charles College have failed to take and subscribe the oath required by an act of the General Assembly, entitled "An act relative to railroad directors and other officers or trustees of any incorporated company or institution," approved March 23, 1863, and that "by the terms of the last recited act, the offices of said curators so failing to take and subscribe said oath have been and are vacated;" and that "in consequence of the vacancies in said board of curators the number of qualified curators has been diminished so that a quorum for the transaction of business can not be had;" and the act appoints the defendants, together with Arnold Krekel, John Orrick, and Edward A. Lewis, qualified curators of the old board, as the curators of the college, and makes some other amendments not important to consider. The defendants demur to the information, and judgment was rendered in their favor in the Circuit Court, which was affirmed in the District Court.

The defendants combat the claim of relators upon the fundamental ground that most of them were never entitled to their positions, not having been elected according to the provisions of the original charter, but under an amendment, itself a violation of that charter, and also upon the ground that they were properly ejected by the act of December, 1863, for not having taken the oath required by the act of March previous. The relators, on the other hand, contend that this amendment was lawful; that the acts of March and December, 1863, were unconstitutional, and that their removal was illegal.

The relators may have, first, an absolute right to their places—a right that would be sustained without reference to the question of possession, and even under lawful judicial proceedings against them; or, second, a right to continue in possession until removed by such proceedings. Our views upon the second question might relieve us from the expression of any opinion upon the matters embraced in the first; but the labor of counsel and the attention of the courts below have been chiefly directed to them, and their decision will become necessary to a final settlement of the controversy. The interests of the college and of the community require an early adjustment of all matters in dispute, without the necessity of again coming before this court.

Both parties seem to rely upon the same general principles governing corporations, and the power of the State over them—and the relators especially press upon our consideration the authority of the case of *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518.

The limitations upon the power of the Legislature over a corporation like the St. Charles College, as elucidated in the able and elaborate opinions in the great Dartmouth College case, leave little to be said except in their application. That such corporations are private as opposed to municipal, or such as are owned entirely by the State; that they are strictly eleemosynary, contributing to our higher wants, and generally furnishing, to the comparatively poor, opportunities otherwise beyond their reach; that private contributions for the endowment of institutions of learning, on the faith of a charter, constitute a contract between the contributors and others interested and the State; that the contribution is a sufficient consideration for the franchises given by the charter, the whole constituting a valid and binding agreement not to be impaired by the State nor avoided by the corporation; that the trustees named in the charter, and those chosen as their successors according to its terms, are not only trustees of the fund, but also take the place of the founder of the charity as its lawful visitors and overseers—their trust implying an obligation to govern according to the statutes of the founder as embodied in the charter; that in fulfilling this obligation they

State ex rel. Pittman et al. v. Adams et al.

can be controlled as other trustees, the only duty of the courts being to see that the trust is faithfully executed; and that any statute making a substantial change in the charter, as by the addition of new trustees, or by a material change in the manner of choosing them, in the mode of expending the funds, or in the objects of the charity, impairs the obligation of the contract, and is forbidden by the constitution of the United States, are propositions recognized or established in that case and substantially followed in all others. We have nothing now to do with the many disputed applications of the doctrines of that case to other classes of corporations; but, so far as such charities as the one involved in this cause are concerned, we regard them as eminently just and beneficial—just in recognizing one's right to do what he will with his own, and beneficial in encouraging benevolent gifts. But for the stability of such grants, and the fidelity of their administration under the law of England, those old colonial institutions that have played so important a part in our civilization and progress would not have existed; and, if donors are now made to feel any doubt as to the security of their endowments, our many promising establishments dependent upon private liberality must fail.

The charter of St. Charles College, it is seen, expressly describes Mr. Collier as its founder. The corporators are named, and provision is made for the choice of their successors in a particular manner. The college was to be unsectarian in its character, at least in this, that no power or control over it was given to any ecclesiastical body; and it was expressly provided that the board of curators should conduct it on the principles of its foundation, which were declared to be purely literary, embracing languages, science, and the liberal arts, and expressly excluding theology. The board also were forbidden to make any regulation rendering a place in the classes offensive to reasonable, liberal-minded persons, whatever their religious opinions. It would have been difficult to more emphatically provide for the exclusion of special or denominational religious influences. The declared objects and principles of the foundation are inconsistent with it, and the choice of future curators is to be uncontrolled by any

ecclesiastical body or personage. We do not, hence, suppose that the founder intended to exclude all influence from, or instruction in, the great principles of Christian ethics, the basis of all character, the foundation of good citizenship and just government, and which are professedly adopted by men of all creeds; but he did intend to prevent the institution from becoming in any special sense a theological or religious school. The amendment to the charter, by requiring the concurrence in the choice of curators, of an ecclesiastical body representing one of the religious denominations of the State, endangers, in this regard, the principles of the foundation; and, even if it did not, it changes the character of the administrators of the trust, hinders the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impairs the contract under which he advanced it.

The only question that can arise under this branch of the case pertains to the validity of the acceptance of this amendment by the curators. It is true there is a great difference between the powers of the trustees of an eleemosynary corporation, with visitorial powers, like a college or a hospital, and those of a private moneyed corporation, like a bank or railroad. The latter are composed of shareholders, each of whom is a member of the company, who make the by-laws and all lawful regulations, elect directors for a limited period, and themselves compose the corporation. Amendments to the charter, not in violation of its objects, may be accepted by the shareholders, but the trustees have no general powers, are simply their agents, and are under their control. The law of visitation, as applied to charities, has no application to them. But in eleemosynary corporations there are no stockholders; and regulations that in ordinary corporations are made by them, and disputes that are submitted to the courts, are made and decided by those intrusted with the visitorial power. The visitor is the judge or arbiter to decide all disputed questions not involving the integrity of the management of the fund or the observance of the statutes of the founder, and he alone can make regulations and by-laws that shall bind the officers. There being no constituent members, he, in a sense, is the corporation and

State ex rel. Pittman et al. v. Adams et al.

controls its operations, subject only to the expressed will of the founder. By the common law, the founder and his heirs are the visitors. *Cujus est dare, ejus est disponere*. But the foundation may provide for other visitors; and, in England, that office is generally withheld from the trustees who hold the fund, in order that they may be also visited. But in this country the visitorial power over schools and colleges, together with all other powers and rights belonging to them, are usually vested in boards of curators, or trustees, established by the charter creating the corporation, who must be governed by the provisions of the charter, as embodying the statutes of the founder. The power of these boards is great, but by no means absolute. They are the creatures of the charter, or, rather, of the will of the founder, as embodied in it, and must walk in the path marked out by it. Upon the general subject of visitation, see Angell & Ames on Corporations, 3d ed., chap. 19; 2 Kent's Com. 300, 303; opinion of Judge Story in Trustees of Dartmouth v. Woodward, 4 Wheat. 518, and Allen v. McKeen, 1 Sumner, 300; Phillips v. Bury, 2 T. R. 348; Murdock's Appeal, 7 Pick. 322.

But while the trustees of an eleemosynary corporation, with visitorial powers, have more authority than those of ordinary corporate bodies, it is nevertheless strictly limited, and the language of Judge Story, in Dartmouth v. Woodward, following, in this respect, the English authorities, that the crown can not, "without the consent of the corporation, alter or amend the charter," should not be held to recognize the doctrine that, under our laws, alterations or amendments can in all cases be made with such consent. Most of the English cases discussing the power of the crown over charters, and the validity of changes with the consent of the corporation, arose with regard to corporate boroughs; and while, in this country, the Legislature which grants the charter of such corporations has undisputed power over them, in England, although held from the king alone, when once granted, they are beyond his control. (*Rex v. Amery*, 2 T. R. 568; *Rex v. Passmore*, 3 T. R. 199.) These boroughs being represented in Parliament, the liberties of England demanded that they should be independent of the king, and yet there was

State ex rel. Pittman et al. v. Adams et al.

no reason why they might not accept amendments to their charters. So, in this country, moneyed corporations, composed of shareholders for whose use and benefit the charter is granted, may, in general, accept amendments, for it would be unreasonable to prevent those who make a contract for their own use, from consenting to a change of its terms. But this consent must be the act of the corporators or shareholders themselves, and not of their trustees, and even then it has been held that the majority can not validate such amendments as materially change the objects of the association. (Hartford & N. H. R.R. Co. v. Cresswell, 5 Hill, 383—doubted in Buffalo & N. Y. R.R. Co. v. Dudley, 14 N. Y. 336.) But in charities the corporators are not the owners of the fund, neither is it held to their use; their consent would not affect their own property, but that of others; and their office of visitors, so far from giving them power to authorize any change in its management and control contrary to the will of the founder, imposes upon them rather the obligation of seeing that that will is made paramount.

If the Legislature had power, with the concurrence of the curators, to make the amendment of 1847 to the charter of St. Charles College, is there any limit in this regard? May not any changes be made? If the original trust, in all its requirements, is not obligatory, where shall the line be drawn? and what is to hinder a total perversion of the fund? If a change can be made so material as one affecting the choice of curators, I can see no limit. The naked question then arises, whether the curators or trustees of an eleemosynary corporation can validate, by petition or subsequent acceptance, any substantial change by the Legislature in the provisions of its charter.

The result of the solution of this question is not without apparent inconveniences, whichever view is held. On the one hand, if this power of change be denied, the objects of a charity, it may be said, might become obsolete, or its legitimate ends be crippled by inconvenient provisions that would embarrass its operations, and this limitation of power might destroy, instead of carrying into effect, the will of the founder. But it is not necessary to hold all changes to be absolutely prohibited: for it is easy

State ex rel. Pittman et al. v. Adams et al.

to imagine such altered conditions of society and of pursuits that a strict adherence to all the formal requirements of a foundation might defeat its object, as, for instance, if in centuries past the founder of a college had enumerated alchemy and astrology among its studies, the study of chemistry and astronomy might be deemed a truer compliance with the object of the charity; for it should be presumed that he desired the pursuit of the substance rather than the shadow, even though he had been able to see only the shadow. So other changes may be found necessary in furtherance of the objects of the charity, which visitors should have authority to make or assent to, if they require an amendment to the charter. But, on the other hand, if the general power of consent is lodged in the directors or curators, there is no security whatever in eleemosynary grants. The founder may recall or change the character of his gift, even after contributions to swell it have been made by others, or the directors of the corporation administering it may fancy they have a better way, or may be personally interested in another mode. The State can do nothing alone; the directors can do nothing alone (1 Watts & Serg. 36; 1 Burr. 201); but, by their joint action, the whole character of the foundation may be changed. Our observation shows the ease with which legislative action is sometimes had, and it seems to me that the dangers to all charities—their great liability to perversion, if such changes are permitted—are more to be dreaded than the inconvenience of the restriction.

And besides, what right has the State, or those called upon to administer a charity, to dictate conditions to its founder? Those conditions may seem to us foolish fancies; we may deem ourselves far more competent to establish such as will secure the general object, but it is not ours to say. When we see fit to create such a foundation out of our own fortunes, we shall be at perfect liberty to show our wisdom, but it is out of place in administering the fortunes of others. When Mr. Girard established his celebrated college, he imposed conditions offensive to a large majority of the community. No attempt was made, I believe, to dispense with the conditions and accept the gift, though the validity of the bequest was attacked on behalf of his heirs.

State ex rel. Pittman et al. v. Adams et al.

One may do what he will with his own, and if his benevolent instincts lead him to expend his fortune for the good of others, public policy certainly requires that he should be made to feel quite secure in his benevolence. This security he can never feel, if his gift shall be subject to the changing opinions of its future administrators, with the frail check only of legislative consent.

Light may be thrown upon this subject by considering the nature of the grant, the relation held to it by the curators, and who are the real parties in interest. First, the grant is absolute, subject only to the conditions imposed. Subsequent contributors are subject to the same conditions, and the heaviest have no such interest as will entitle them to come into court in their own name, but, like others, they must be represented by the attorney-general. (*Kemper v. Trustees of Lane Seminary*, 17 Ohio, 293.) Second, the curators can govern only according to the conditions of the foundation. The interest of the corporation itself is only that of a trustee, and the power of visitation in its board is but a trust. Judge Story, in *Allen v. McKeen*, 1 Sumner, on page 300, says: "But what is the nature and extent of this visitorial power? Is it the power to revoke the gift, or change its uses? to divest the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses and enforce a due performance of the statutes of the charity." Third, the corporators, then, have no personal beneficial interest; their interest is rather a duty. Nor has the State received the grant; it has simply designated a body capable of executing its uses. Who, then, are the real parties in interest? Clearly the beneficiaries of the charity. Their right becomes, as it were, vested; they are, as it were, the equitable owners of the fund. The curators, then, having no power over the charter, but it being, on the other hand, their creator and their absolute rule of conduct, and the beneficial interest in the fund belonging neither to them nor to the State, but to the beneficiaries only, who, from the nature of the case, can not consent, I infer that the essential conditions of the charter are permanent so far as change depends upon consent.

The doctrine that the managing board can not validate any

State ex rel. Pittman et al. v. Adams et al.

improper legislative change, if not expressly decided, is clearly recognized in *Allen v. McKeen*. The State of Massachusetts founded Bowdoin College, and in the act creating the foundation reserved the right of change. By the act of separation from Maine it guaranteed the powers and privileges of the charter, but afterward authorized such changes by the trustees as should induce the Legislature of Maine to increase the endowment. Subsequently Maine made general changes in the charter, requiring, among other things, the removal of the president, Allen, which changes were acquiesced in by the trustees. The court decided that Massachusetts, as founder, having, in the original charter, reserved the right of making changes, had the power to consent to such as were made according to the terms of the reservation; but that the changes actually made were unauthorized, and that the boards of the corporation, though charged with visitorial power, could not consent to them. Upon this point Judge Story, on pages 313-14, remarks: "But it is said that the boards (of trustees and overseers) have assented to the act and have adopted it, and it has therefore become binding on the college. I think that the argument is not correct. * * But if the acquiescence of the boards could be construed into an approval of the act (as I think it ought not to be), still that approval can not give effect to an unconstitutional act. The Legislature and the boards are not the only parties in interest upon such constitutional questions. The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers, and no private arrangements between such parties can supersede them."

We must then hold that this alleged acceptance of the amendment of 1847, to the charter of St. Charles College, gave it no validity; that the amendment had not become necessary to further the objects of the charity, but its direct tendency was to change the principles of its administration; and that, in consenting to it, the board of curators went beyond their powers.

The relators were removed from their positions by the act of December 11, 1863, partially recited in the relation, and they claim that it was illegal, inasmuch as this act and the one to which

State ex rel. Pittman et al. v. Adams et al.

it refers, violated the contract of the charter, were *ex post facto*, bills of attainder, etc. The oath referred to was what is commonly called the convention oath, and is an oath of loyalty in disclaiming hostilities in the past, and promising future fidelity.

I have no doubt whatever of the power of the Legislature, pending our late contest, to take measures to remove from the management of corporations of a public nature those who came within the purview of that oath. It can not be a violation of the contract embraced in the charter, for fidelity to the State is embraced in every such contract. An alien enemy may be forbidden to live among us, and, by strict law, he may be imprisoned and his property confiscated. It will hardly be pretended that a charter involves the imperative obligation of permitting him to remain in the management of those corporations whose operations may be made to embarrass us or aid the public enemy. Nor can the right of a domestic enemy be deemed greater. The duty of loyalty is antecedent, perpetual, paramount—and in granting a charter the State can make no engagement to dispense with that duty. It enters into the contract and is a fundamental condition of the grant. This court has always sustained such police and other regulations as often, in times of tranquillity, have been imposed by the Legislature upon corporations, although they run counter to provisions in their charters. How much more in time of war when encompassed by dangers!

Nor, until the late opinions of the United States Supreme Court, had I supposed that such disability as is involved in the requirements of the oath, could be held, in the constitutional sense, an *ex post facto* law, or a bill of pains and penalties, for it does not provide in any legal sense for a trial and punishment for crime, nor is it a legislative judgment. The history of the times shows that the requirement was not intended as a punishment, either judicial or legislative, but a disability imposed upon the enemies of the State, supposed to have been demanded by pressing public danger. It was no more considered as coming within the prohibitions of the federal constitution than the many other disabilities which are imposed, without question, for the public good.

But, whatever our opinion of the power of the Legislature over

State ex rel. Pittman et al. v. Adams et al.

corporations, as embodied in the act of March, the act of December 11, ousting the relators, can not be sustained upon any principle known to our laws, for the reason that it is judicial in its character—a legislative judgment. Had vacancies been created by judicial proceedings, so as to reduce the board below a quorum, or had the reduction been caused by death or otherwise, by which the functions of the corporation had become suspended, the Legislature might doubtless have restored them by filling such vacancies. But this act assumes, without judicial finding, that the relators had forfeited their position; it cuts off any and all defenses they might make upon a trial of their right, declares vacancies, and proceeds to fill them. Its object and legal effect was to remove the relators by direct legislation.

It may be said that we are concluded by the recitals of the act, and that the facts recited are of sufficient foundation for the ouster. But we can not assume anything against the defendants upon the strength of the act, unless we find it to have been within the scope of legislative powers. The recitals of a judgment, if within the record and the law, are taken as true; so the recital in a statute will, in general, be taken as correct. But an act declaring a forfeiture, if outside of legislative authority, can not be strengthened by reciting facts that might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment, but the question of forfeiture is strictly judicial, and the Legislature can not constitutionally know either that the facts exist or their legal effect. It would be absurd to hold that we are bound by a recital of facts which the Legislature had no right to find, and by an assumption of their effect which it had no right to declare.

The law relating to the power of amotion, a term often applied as well to the disfranchisement of a member as to the removal of an officer of a corporation, has been long and well settled. It is a power, judicial in its character, generally exercised by the courts of the land, though it may be given to the corporation by its charter, and, even if the charter is silent, an officer or a corporator, in some classes of corporations, may be expelled for

State ex rel. Pittman et al. v. Adams et al.

sufficient cause. But it is essential, in every case, that charges be made, a trial be had, and that the accused be notified and have a full opportunity for defense. The matter must be decided judicially and fairly, and, if against the accused, he then may apply to the courts for redress. If it is there found that the corporator or officer has had a fair opportunity for hearing in his society, that the charges against him were sufficient and fairly proved, he can have no further relief, but otherwise he will be restored to all his rights. (See Ang. & Ames on Corp. chap. 12; Boggs' case, 11 Co. 99; Rex v. Richardson, 2 Burr. 536; Com. v. St. Patrick Society, 2 Binn. 441, 448; Com. v. Guardian, etc., 6 Serg. & Rawle, 469; Com. v. Pennsylvania Benevolent Institution, 2 Serg. & Rawle, 141; Fuller v. Plainfield Academy, 2 Conn. 532; The State v. Bryce, 7 Ohio, 2d part, 82; and The Trustees of Dartmouth College v. Woodward, before cited.)

After diligent search I have not found a case where a disfranchisement or amotion will be assumed, or where it is sustained without judicial investigation, either by the corporation, according to its rules, which must be fair, and not arbitrary, or by the courts of the country having jurisdiction.

In Fuller v. Plainfield Academy, the court held that a removal of one of the trustees of the academy by the other trustees was wrongful, because made without sufficient cause; and Judge Daggett, in giving the opinion, says: "But in relation to trustees in whom is vested the visitorial power of an eleemosynary corporation, Story, J., in Dartmouth College, says there can be no amotion of them, though they are subject to the general law of the land. Be this, however, as it may, can such removal be made without sufficient specific charges and passing upon them, judicially? I am satisfied that the question must be answered in the negative."

The State of Ohio v. Bryce, was a motion for a writ of *quo warranto* to test the title of defendant as trustee of the Ohio University. The university was a corporation, but the trustees were elected by the Legislature for life, with power to remove, or suspend one of their number for good cause, until the next session of the Legislature. Mr. Linley, one of the trustees, had removed

State ex rel. Pittman et al. v. Adams et al.

from the State, and, without any action of the board or judgment of removal, the Legislature, by joint resolution, appointed the defendant, a "trustee, etc., to fill the vacancy occasioned by Jacob Linley having removed out of the State." Mr. Linley, returning, claimed his place in the board, and the court held that he was entitled to it; that Bryce was unlawfully appointed, because there was no vacancy. Judge Lane remarks: "This proceeding (motion of a corporator) is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right, or the infliction of a penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. * * * In the present case, if the relator had forfeited his office by neglecting his duties, it was necessary that the corporation, after reasonable notice to him, and an opportunity for hearing, should investigate the facts, and determine his title to the office by sentence, and thus create the vacancy. Until this was done the relator was entitled to his seat, and the contingency had not happened in which the Legislature could lawfully appoint a trustee."

Further quotations would be superfluous. The law guards the right of corporators, and, through them, the rights of all interested in the uses of the corporation, with the same jealousy as other property. A fair and open trial is our instinctive demand, and is imperatively secured. The foundation, the distinguishing feature of a free government, is embraced in the spirit of that great provision — the corner-stone, as it were — of the English and American constitutions, that no one can be deprived of life, liberty, or property, except by due process of law. Such process involves a judicial investigation, with every safeguard for a full and fair hearing, according to the form and governed by the rules that control all other similar investigations. A legislative enactment can not meet the requirement. Though it may not be strictly a bill of attainder, yet it is in the nature of such bill — is equally unjust and odious, and is unknown to our jurisprudence.

Such judicial action by the Legislature was expressly guarded against by article II of the State constitution, in force in 1863,

which prohibited the union of the legislative and judicial powers; and, even without that article, the assumption, either by the Legislature or the courts, of powers belonging to the other department, ought not to be countenanced. If there is anything settled in our system of government, it is the complete separation of their functions.

It may be said that the act of December, 1863, does not purport to make a removal, but only an appointment to fill previous vacancies. There were then no vacancies to be filled. The relators aver that they were elected and acted as curators up to the time of the intrusion of defendants; that they never resigned, and were never removed or displaced until that time, and that defendants entered under authority of that act. The act itself recites the facts upon which the authority is claimed, but makes no mention of any regular removal. It recites the assumed failure of the relators to take the oath required by the act of March 23, and speaks of the vacancy as follows: "And whereas, by the terms of the last recited act (act of March preceding), the offices of said curators so failing to take and subscribe said oath have been and are vacated; and whereas, in consequence of the vacancies," etc. Now, by referring to the act of March, it will be seen that it requires certain persons to take the oath within a certain time, and provides that those who fail to do so "shall vacate their offices," etc. But the act itself, *proprio vigore*, creates no vacancy, and does not purport to do so. It is legislative and altogether general in its character, and can only be brought home to relators by a judicial proceeding. The Legislature, in December, could not know that relators had not taken the oath, or were bound to take it. Hence the act of December created this vacancy, or assumed a falsity and filled one that did not exist.

Counsel for defendants claim other disqualifications of relators, and especially that they have not taken the oath required by the present constitution. This question is not involved in the record. All we can know is that relators were wrongfully turned out, and that defendants hold their places. If reinstated, they acquire no new rights, only such as arise from peaceable possession, claiming

title, and are subject to any lawful proceeding to test that title. They are still liable to be removed for cause, but it must be by a direct judicial proceeding, or by a proceeding of a judicial nature, before the board, according to the charter, with the right of full defense, and with the benefit of possession.

We hold, then: first, that the act of February 6, 1847, amending the original act of February 3, 1837, incorporating St. Charles College, inasmuch as it materially changed the mode of choosing curators, and in a manner to endanger the principles of the foundation, was a violation of the contract embraced in the charter, and could not be validated by the subsequent consent of the curators; second, that, although the act of March 23, 1863, providing for taking the management of corporations of a public nature from the hands of those who, during the pending war, were aiding the enemy, was a lawful exercise of legislative power for the public safety in time of war, yet it furnished no warrant for the act of December 11, of the same year, profess- edly founded upon it; third, that the relators regularly holding their places under claim of right, could not be removed except by judgment at law, or by a proceeding of a judicial nature before the board of curators, according to the charter, with notice and opportunity of defense; that the act of December 11, 1863, so far as it created vacancies, or assumed and filled vacancies not lawfully created, was an exercise of judicial power not belonging to the Legislature; that the vacancies could not be filled by that body until they were created by a lawful removal of relators; and that whatever, in our opinion, in a direct proceeding against them, the judgment might be, or should be, we can not act upon that opinion until such judgment is rendered.

We therefore hold that the relators should be restored to their places, to be held until resignation or removal by some lawful proceeding, and that defendants, having been appointed to fill vacancies that did not exist, are intruders, though without malice, and should be ousted.

The judgment is reversed, and the cause remanded. The other judges concur.

State of Missouri ex rel. Nicholson v. Rombauer.

STATE OF MISSOURI *ex rel.* DAVID NICHOLSON, Relator, *v.*
R. E. ROMBAUER, Respondent.

1. *Practice, Civil—Verdict—Where responsive, etc., refusal by court to receive improper.*—After a jury have pronounced their verdict, the court may, before receiving it, request them to retire and reconsider; and in such case they may change or adhere to their verdict, at their option. But where the verdict is sensible, consistent, and responsive to the issues, the court can not absolutely and finally reject and refuse to record the same, even though it be clearly against the evidence, and contrary to the law as laid down by the court. The statute (Gen. Stat. 1865, ch. 172, § 3) has made ample provision, by motion for new trial, for rectifying errors in verdicts, and preventing injustice or mistakes on the part of juries.

Petition for mandamus.

Strong, for relator.

I. A verdict responsive to the issues should be received and recorded. (State v. Ostrander, 30 Mo. 13; State v. Schoenwald, 31 Mo. 155, 158; State v. Arrington, 3 Murphy, 571; Moody v. McDonald, 4 Cal. 297; Russell v. Wheeler, 1 Hemp. 3.) An unintelligible verdict may be set aside on motion. (Ford v. Ford, 3 Wis. 399.)

II. *Mandamus* is a proper remedy in this case. (Pratte v. Cabanne, 12 Mo. 194; Boyce's Adm'r v. Smith's Adm'r, 16 Mo. 317; Leahy v. Dugdale, 41 Mo. 517.)

III. A verdict will not be set aside when it is according to the law and evidence, properly understood, even though it may be contrary to the instructions given by the court. (Van Vacter v. Brewster *et al.*, 1 Sm. & M. 410.)

IV. A verdict which the court can understand, is good, though it may be informal. (Jones v. Julian, 12 Ind. 274.)

V. A verdict can not be amended by the court in matters of substance. (Wallace v. Hilliard, 7 Wis. 627.)

Lackland, Martin & Lackland, for respondent.

I. *Mandamus* will lie only where the act to be done is purely ministerial, and nothing like judgment or discretion in its performance is left to the officer. (United States v. Guthrie, 17

State of Missouri ex rel. Nicholson v. Rombauer.

How. 284; 12 Peters, 524; 14 Peters, 497; 6 How. 92; 1 Manning, 359; 23 Mo. 499; 19 Johns. 259; 5 Ohio, 529; 8 Ind. 345; 14 Ohio, 322; Tapping on Mandamus, 65; The King v. The Justices of Monmouth, 7 Dowl. & Ryl. 334.) The superior court examines into the proceedings to see if the act is within the discretion of the judge, and no further. It can not restrain or control that discretion. (Commonwealth v. Justices of the Court of Sessions, 5 Mass. 437; Meacham v. Austin, 5 Day, 233.)

II. *Mandamus* will not issue to obtain the opinion of this court upon a matter of law. It is an extraordinary remedy for the purpose of justice alone. (Tapping on Mandamus; Williams v. Judge of Cooper County Court, 27 Mo. 225, and authorities there cited.)

III. The entry of the verdict would be of no avail to the relator, and therefore this court will not order it to be done. (Commonwealth v. Commissioners of Lancaster County, 6 Binney, 5; Dodd v. Miller, 14 Ind. 433; Tapping on Mandamus, 67; 8 Ind. 345.)

IV. *Mandamus* will not be awarded in any case admitting of another legal remedy, as, in this case, by appeal. (*Ex parte* Goolsby, 2 Grattan, 575; People v. Judge of Branch Circuit Court, 1 Doug. 319; Williams v. Judge of Cooper County, 27 Mo. 225; 6 Iowa, 456.)

V. *Mandamus* will issue only where the relator has a clear and undoubted right to have the act performed. (Williams v. Judge of Cooper County, 27 Mo. 225; Tapping on Mandamus, 65; People v. Hatch, 33 Ill. 9, 123; Morris v. Ten Eyck, 2 N. Y. Leg. Obs. 9; 11 Iowa, 505; 14 Iowa, 501; 2 Barb. 566; 5 Mass. 437; 5 Day, 233; 10 Mich. 14, 263; 37 Barb. 343; *Ex parte* Bassett, 2 Cow. 458; Proprietors of Kennebeck Toll Bridge, petitioners, 2 Fairfield, 263; Commonwealth v. Justices of the Court of Sessions, 5 Mass. 437; Bacot v. Keith, 2 Bay, 466.)

VI. Courts have control over verdicts, and may set them aside or refuse to receive them when they are contrary to law or against the evidence. (Commonwealth v. Justices of Court of Sessions,

State of Missouri ex rel. Nicholson v. Rombauer.

5 Mass. 437; *Ex parte* Bassett, 2 Cow. 458; *Morris v. Ten Eyck*, 2 N. Y. Leg. Obs. 9; Proprietors of Kennebeck Toll Bridge, petitioners, 2 Fairfield, 263; *Walker v. Smith*, 1 Washb. 202; *Bryant v. Com. Ins. Co.*, 13 Pick. 543; 2 Bay, 466; *McGrath v. Lorton*, 2 McCord, 26; *Bell v. Hutchinson*, *id.* 409.)

WAGNER, Judge, delivered the opinion of the court.

The relator prays this court to grant a peremptory writ of *mandamus* against the respondent, who is one of the judges of the St. Louis Circuit Court, to compel him to receive and record a verdict rendered by a jury.

It appears that a suit was instituted in the Circuit Court by one McDonough against the relator, claiming damages for injuries sustained in consequence of a wall giving way and falling. After the evidence was submitted and instructions given by the court, the jury retired to consider of their verdict, and, upon consultation thereon, returned with the following: "We, the jury, find for the plaintiff, and assess his damages at one dollar and costs." [Signed] "L. Leming, foreman." This the court refused to receive, because it was deemed contrary to the evidence and law as given by the court. The jury again retired in obedience to the orders of the court, and, after some time spent in further consultation, failed to agree upon any other verdict, and were accordingly discharged.

The question is, whether the Circuit Court, of its own mere motion, has the right to reject a verdict, and refuse to have it recorded, because it is considered as contrary to the evidence and against the law. It must be conceded that the practice is unusual, and not in consonance with the usual course adopted in this State, where the verdict is against the law and the evidence.

The uniform mode which has always prevailed in this State, where the verdict is sensible, consistent, and responsive to the issue, is to receive and record it, and then to set it aside on motion and grant a new trial, where it is against the instructions of the court, or not sustained by the evidence. Where a verdict of a jury is merely informal, the court may put it in proper form. (*Henley v. Arbuckle*, 13 Mo. 209.) A substantial omission in

State of Missouri ex rel. Nicholson v. Rombauer.

the verdict of a jury may be supplied by the court, with their consent, so as to make it conform to their intention; or the jury may change their verdict, if they find they have made a mistake, at any time before it is finally received by the court.

In England, in an early period, when the courts to a great extent controlled the verdict of juries, it was the common practice, where the court considered the verdict manifestly against the evidence, before the verdict was recorded, but not after, to send the jury back and make them reconsider the case. This practice has prevailed to a certain degree in some of the American States, where the English practice permitting the court to advise the jury, by orally commenting on and summing up, has been adhered to.

In *Blackley v. Sheldon*, 7 Johns. 32, the action was trover, to which the defendants pleaded not guilty, and there was a trial before a jury. The jury having agreed on their verdict, returned into court and delivered the same in writing, by which they found for the defendant. The court, without publishing their verdict or making it known, informed the jury that, in its opinion, they had mistaken the evidence, and requested them to reconsider their verdict. The jury retired, and soon after requested to have a witness re-examined, and the witness was re-examined in the presence of both parties, and without objection by either. The jury then brought in a verdict in writing in favor of the plaintiff, on which judgment was given. The Supreme Court sustained the proceeding, and said that the law was well settled that before a verdict was recorded, the jury might vary from the first offer of their verdict, and the verdict which was recorded should stand, and that there were many cases in the books of a jury changing their verdict immediately after they had pronounced it in open court, and before it was received and entered. The court then refers to the old English authorities. (Dyer, 204; Plowd, 209; *Saunders v. Freeman*, Co. Litt. 227, note *b*.)

But the ground on which the decision is based is clearly exhibited in the concluding paragraphs of the opinion. "If the verdict be delivered in writing, as it was here, the justice had a right to permit the verdict to be taken by the poll, and the jury had a right to vary from their first finding. They had a right to retire

State of Missouri ex rel. Nicholson v. Rombauer.

and reconsider, and all that the justice did in this case was to request the jury to reconsider their verdict. They might have refused to reconsider, and have insisted upon adhering to their first verdict, but they consented to reconsider. It was their voluntary act, and one which they had a right to do. There was nothing, then, erroneous in the conduct of the justice. The verdict received and recorded was the only one to be regarded, and, consequently, the judgment below ought to be affirmed."

In that case, it will be perceived, there was no rejection of, and no absolute refusal to receive, the verdict, but a simple request to reconsider, as the justice supposed the jury had mistaken the evidence, which turned out to be true. And the court says it was discretionary with the jury to reconsider or not. But had the jury refused to reconsider, and insisted on their first verdict, the implication is that it would have been the duty of the court to receive it, and have it entered of record.

In the case of the State v. Ostrander, 30 Mo. 13, it was adjudged by this court that, if the verdict returned by a jury in a criminal prosecution be sensible and responsive to the issue, it is the duty of the court to receive it and have it recorded, and that the judge could not refuse to receive a verdict returned by the jury, on the ground that it was manifestly against the weight of evidence. That was a criminal case, but the clear and able reasoning of the court equally applies to a civil case. Judge Napton examines the question at length, and refers to the same authorities quoted by the court in Blackley v. Sheldon, and declares them not applicable to our practice.

Our statute has made ample provision for rectifying errors in verdicts and preventing injustice being done by mistakes on the part of juries. It enacts that in every case where there has been a mistake or surprise of a party, his agent or attorney, or a misdirection of the jury by the court, or a mistake by the jury, or a finding contrary to the direction of the court, or a fraud or deceit practiced by one party on the other, or the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action

State of Missouri ex rel. Nicholson v. Rombauer.

or defense, it shall, on motion of the proper party, grant a new trial, and, if necessary, permit the pleadings to be amended on such terms as may be just. (Gen. Stat. 1865, ch. 172, § 3.) This section was intended to introduce a uniform rule of practice in regard to the power of courts over the findings and verdicts of juries.

If the jury find contrary to the law as given them by the court, or their verdict is clearly against the evidence, the court has authority, upon motion of the proper party, to set aside the verdict and grant a new trial. The next section of the same chapter declares that only one new trial shall be allowed to either party. But if the court can, of its own motion, refuse to receive a verdict, or reject it entirely, the provision would, in a great degree, be nullified, as the court might award any number of trials, till a jury was obtained who would find the desired verdict. This, plainly, was not the intention of the law. Every lawyer who is engaged in practice knows that juries often find against the evidence, and against the instructions of the court. When such an event happens, the duty of the court is clear to promptly set aside the verdict when a motion is made for that purpose by the aggrieved party.

The bill of exceptions states that, when the jury returned with the verdict, the "court, having asked plaintiff whether he would receive this as a verdict, and the plaintiff refusing to do so, the court refused to receive the verdict or permit it to be entered of record, and thereupon ordered the jury to retire with the papers in the case, and further consider the said cause, which the jury did, and the court, of its motion," gave an additional instruction.

The jury then, after consulting and reconsidering the matter, were unable to agree, and so reported to the court, and were discharged. The jury acted not voluntarily, but by the order and compulsion of the court, and they failed to alter their conclusions and arrive at a new and different verdict.

As to form, the verdict brought in was responsive to the issues. It found for the plaintiff and assessed his damages; it may have been against the weight of evidence, and contrary to the law as laid down by the court. If so, it should have been set aside on

Nelson v. Brodhack.

motion, and a new trial ordered, but not summarily rejected. I am of the opinion that the course here pursued would introduce a dangerous practice, and ought not to be approved.

The verdict should be received and entered of record, and the plaintiff may pursue his remedy by resorting to his motion.

Let the writ issue. The other judges concur.

THOMAS S. NELSON, Appellant, v. JOHN BRODHACK, Respondent.

1. *Practice, Civil—Special pleas in bar—Inconsistency.*—The old special pleas in bar were technically supposed to confess and avoid, although in fact they might not confess at all. Hence, in a technical sense, they were inconsistent with a denial; but they were not held to be so inconsistent as not to be pleadable together, unless there was an absolute incompatibility of facts.
2. *Practice, Civil—Note—Pleas—Special in bar, and non est factum.*—In a suit on a note, pleas of *non est factum* and payment, or release or other discharge, are not necessarily inconsistent.
3. *Practice, Civil—Pleadings—Inconsistency—Meaning of, in the statutes.*—The consistency required by the statute (Gen. Stat. 1865, ch. 165, § 14) is one of fact merely. Two or more defenses are held to be inconsistent only where the proof of one necessarily disproves the other. But, under our system, the facts should be so set out in the pleading that both defenses may be true.
4. *Practice, Civil—Pleadings—Statute of limitations vests title in plaintiff.*—The statute of limitations, where it operates, vests the absolute title of the property, and there is no more necessity of pleading it to an action of ejectment than though defendant held the plaintiff's title.
5. *Land and land titles—Description—Certainty of.*—It is not necessary that the description of land be contained in the body of a deed. It is sufficient if it refers, for identification, to some other instrument or document; or, if no reference be made, surveys, monuments, etc., must be ascertained, in order to locate the land. But the description must be contained in the instrument or its references, express or implied, with such certainty that the locality of the land can be ascertained from it.
6. *Land and land titles—Sheriff's deed—Presumption of intendment.*—The same presumption of intendment can not be inferred from a sheriff's deed as from a direct conveyance from the grantor. In the latter case the ambiguity is the grantor's fault. He has voluntarily sold his property and received the proceeds; and everything should be construed more strongly against him than his grantees.
7. *Land and land titles—Execution—Sheriff's deed—Advertisement.*—In a sheriff's deed the description of the land thereby conveyed was so imperfect that nothing could pass by that alone. But the deed further recited that the sheriff had given notice of the time and place of sale, and of the real estate to

Nelson v. Brodhack.

be sold, in the St. Louis Daily Union, etc., "a copy of which advertisement is hereto annexed, and makes part of this deed." And in the granting part, the sheriff transferred to the purchaser the interests of defendant in the execution "in and to the above-described real estate." The copy of the advertisement was attached by a wafer, after his signature. *Held*, that the description in the deed in no way referring, either directly or indirectly, to the advertisement, was not modified or controlled by it; and that the advertisement could not be treated as a part of the description.

Appeal from St. Louis Circuit Court.

Hospes, for appellant.

I. The plea of the statute of limitations is a plea in confession and avoidance. (1 Chit. 556; Steph. on Pl. 138, 139, 198, 200; Bauer v. Wagner, 39 Mo. 385.)

II. The deed from the sheriff to Nelson contains a definite and certain description of the property conveyed. (Noonan v. Lee, 2 Black, 499; Vance v. Fore, 24 Cal. 435; Seaward v. Malotte, 15 Cal. 304; 32 Barb. 374; Carson v. Ray, 7 Jones' Law, 609; Peck v. Mallams, 6 Seld. 509; Stanley v. Green, 12 Cal. 148.)

Clover & Reber, for respondent.

I. The sheriff's deed, under which plaintiff claims, is void for uncertainty. (Clemens v. Rannells, 34 Mo. 579.)

II. The opinion of witnesses as to the proper location of a grant or conveyance is inadmissible. (Blumenthal v. Roll, 24 Mo. 113; Schultz v. Lindell, 30 Mo. 310, 312, 321.)

III. It is not competent to remove a patent ambiguity by the testimony of witnesses. (2 Starkie, 546.)

IV. The plea of the statute of limitations is not inconsistent with a denial of the plaintiff's title, and therefore the pleas may well stand together. (Bauer v. Wagner, 39 Mo. 385; Voorhies' Code, 8th ed., 297.)

V. It is not necessary, in ejectment, to plead the statute of limitations (Adams on Ejectment, 270, 302); and defendant in ejectment might give in evidence a deed by the plaintiff for the *locus in quo*, without pleading it. (Biddle v. Mellon, 13 Mo. 341; Blair v. Smith, 16 Mo. 273; 3 Washb. on Real Property, 113.)

BLISS, Judge, delivered the opinion of the court.

This was an action of ejectment for two parcels of land in the Durand tract, in the city of St. Louis. The plaintiff, under the pleadings, was required to prove title; and, failing to do so, judgment was given for defendant. The issues were made by a denial of the plaintiff's allegations and upon a plea purporting to be a plea of the statute of limitations; and the ~~defendant~~ ^{plaintiff} claims that the last plea was a confession of the plaintiff's original right—was inconsistent with the denials, and relieved the plaintiff from the necessity of proving title. The objection raises the question whether an answer setting up new matter, by way of defense, is so far a confession of the cause of action as, under our statute, to be inconsistent with its denial. The logic of the old special pleas in bar admitted the material allegations of the plaintiff, but pleaded *actio non*, *quia* the new matter. In a technical sense, they were inconsistent with the denial; and, to obviate it, the more recent forms in Chitty threw in an "if," etc., but they were never held to be so inconsistent as not to be pleadable together, unless there was an absolute incompatibility of facts. If we were to limit our statutory allowance of consistent defense by the strict logic of the old special pleas in bar, all special defenses would be cut off when the cause of action was denied; for such special defenses are technically supposed to confess and avoid, although, in fact, they may not confess at all. Such an interpretation of the statute should not be adopted if there is any other that will give a party his clear right to several defenses.

A special defense is not necessarily inconsistent with a denial. For instance, suppose A sues B upon a promissory note; B denies its execution, in the nature of a special *non est factum*, under the old system, and afterwards alleges payment or release. He does not thereby deny the existence of the paper; and an averment of payment, or any other matter of discharge, is not necessarily inconsistent in fact with original non-liability, for men sometimes adjust demands for which they are not liable. If, notwithstanding, the demand is put in suit, it would be unjust to deprive a defendant of every lawful defense. Some interpretation, then, of the term

Nelson v. Brodhack.

"consistent defenses" should be adopted, if possible, that shall be consistent with the statute and secure the rights of full defense. That right will be secured if the consistency required be one of fact merely, and if two or more defenses are held to be inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent if both may be true. Thus, if one has paid or performed a forged or unauthorized or altered promissory note or covenant, he may deny, not the existence of the paper, but that it was his promise or deed, and also aver its payment or satisfaction. But, under our system, the facts should be so set out that both defenses may be true. So, in slander, for charging one with being a thief, the defendant may deny the words and add the *actio non* because the plaintiff stole a horse. Proving the larceny does not prove the speaking the words. The logic of the justification under the old system might be held to admit the act justified, yet there is no inconsistency in the facts alleged. Other illustrations might be given, but none would be more pertinent than the case at bar.

The plaintiff states that at a certain time he was the owner of, and lawfully entitled to, the possession of certain land, and that defendant unlawfully held it from him. Defendant denies both propositions, and afterward says "that he and those under whom he claims have had and held open, notorious, and continuous and exclusive possession of the premises sued for ten years prior to the commencement of this suit, adverse to all other persons, and to the plaintiff, and that such possession bars the plaintiff." This answer differs from the usual form of pleading the statute, and, if it pleads it at all, is clearly argumentative. But, supposing it had been never so formal, would there have been any inconsistency in fact between that allegation and an express denial of title? As we shall presently see, the plea was wholly unnecessary; but whether necessary or not, it admitted nothing, but only gave a reason, as it were, for the denial of title.

But in ejectment the plea of the statute of limitations is not required in order to entitle the defendant to its benefits. The plaintiff alleges that he is the owner, and is lawfully entitled to the possession, and that defendant unlawfully holds it from him.

1

omit

and

2

2 These are affirmative facts which, if denied, he must prove. He must show such title in himself as should give him possession. If the defendant is the lawful owner, the plaintiff fails and fails upon the issue he tenders. It is not necessary for the defendant to set up, by way of answer, title in himself or any one else; it is involved in his denial of the plaintiff's right. But if the defendant wishes to avail himself of any facts that do not amount to such denial, as, for instance, that the plaintiff's remedy is suspended by adverse possession of defendant, if such distinction can be made, he must plead it. The necessity, then, of pleading the statute of limitations depends upon its effect, whether it merely suspends the remedy or vests in the defendant the absolute title to the property. If the latter, there is no more necessity of pleading it than though he held the plaintiff's title.

The effect of the statute in this regard is no longer open to question. Says Washburne (on Real Property, vol. 3, side p. 501): "In summing up the effect of an adverse possession continued for such a length of time as to operate as a statute bar to the claims of others to establish a title to lands, the language of the court in School Districts, etc., against Benson, 31 Me. 384, may be adopted. A legal title is equally valid when once acquired whether it be by disseizin or by deed; it vests the fee simple, although the modes of proof, when adduced to establish it, may differ." "An open, notorious, and adverse possession for twenty years would operate to convey a complete title as much as any written conveyance. * * The operation of the statute takes away the title of the real owner and transfers it * * to the adverse occupant."

The Supreme Court of Pennsylvania, in Moore v. Luce, 29 Penn. St. 262, says: "The statute of limitations gives a perfect title. It is a mistake to suppose that the person barred loses nothing but his remedy." The court speaks to the same effect, but more emphatically, in Schell v. W. V. R.R. Co., 35 Penn. St. 191. The same doctrine is held in Grant v. Fowler, 39 N. H. 101. The following is the syllabus in Hughes v. Graves, 39 Verm. 259: "The party who acquires a title to land under the statute by possession adverse to the true owner acquires all the

Nelson v. Brodhack.

title of the true owner, precisely as if he had a deed from him." This court, in *Biddle v. Mellon*, 13 Mo. 335, affirmed in *Blair v. Smith*, 16 Mo. 273, has held the same doctrine, and all the authorities are same way.

A plea of the statute of limitations, then, is simply a denial of the plaintiff's title. It can have no other legal effect. It need not be pleaded. See, upon this point, *Ellis v. Murray*, 28 Miss. 129, where the court says that "the defendant was therefore not required to plead the statute of limitations; and when the seizin was denied the demandant was required to prove it within the time prescribed." This case was followed in *Lord v. Wilson*, 35 Mo. 490. See, also, *Jackson on Real Actions*, 157, 290; and *Stearns on Real Actions*, 241. The form of the action for the possession of real estate in Massachusetts and other eastern States differs from the action of ejectment, and so does that under our code, but the same substantial issues are made and result reached. In ejectment special pleas in bar are not allowed, the general plea putting everything in issue. (1 Chitty, 507; *Adams on Ejectment*, 270.) The present New York code (§ 74) requires the statute to be always set up, while the Ohio and Kansas codes (Ohio, § 559, and Kansas, § 596) substantially provide for the old issue. Our statute is silent upon the subject, but, as a plea of the statute would be only setting up title in the defendant, which is embraced in the denial of the plaintiff's right, I can not see upon what principle it should be required. In personal actions the case is very different. *Actio non accrevit*, or *non assumpsit infra sex annos*, is very different from, and is not included in, a mere *non-assumpsit*—and in such actions it is always necessary to plead the statute.

I have felt some embarrassment in considering this question, from the opinion of Judge Holmes in *Bauer v. Wagner*, 39 Mo. 385. The decision in that case was clearly right; but the language of the opinion indicates a view of the subject under discussion adverse to the conclusion to which I have arrived, in holding it necessary to plead the statute, and to its supposed corollary that the title of the plaintiff is thereby admitted. I can not but think that the truly learned judge was misled by the

authorities he cited which refer exclusively to personal actions, and that his attention failed to be arrested by the fact that possession under the statute absolutely divests the title of the plaintiff, and not his remedy merely.

In the trial of the case at bar, the plaintiff, to sustain his title, offered a deed from the sheriff, executed in 1849, for what he claims to be the land in controversy. The deed recites the levy upon certain land, but the description is so imperfect that nothing could pass by that alone; but it further recites that he gave notice of the time and place of sale, and of the real estate to be sold, by advertisement in the *St. Louis Daily Union*, etc., "a copy of which advertisement is hereto annexed, and makes part of this deed;" and, in the granting part, he transfers to the purchaser the interests of the defendant in execution "in and to the above-described real estate." The copy of the advertisement is attached by a wafer after the signature; and, in addition to the description in the recital of the levy, I find in it the following: "being the same property which was conveyed by the city of St. Louis to T. M. Knox, by deed recorded," etc. Among the exhibits offered was a transcript of this deed, marked "Exhibit B.," and from the description in it, and in several other deeds connected with it, testimony was offered to locate the land, which was rejected, and the court instructed the jury as follows: "The jury are instructed, as to the land described in the deed of the sheriff to the plaintiff Nelson, dated the 20th April, 1849, given in evidence by him, and described as containing fifty-two feet, more or less, front on the Carondelet road or avenue, by forty arpents in depth, in the Durand tract, that the plaintiff took no title under said deed to said land, because said deed was and is void for uncertainty in the description of said land, and the plaintiff is consequently not entitled to recover in the cause upon his evidence as made."

The uncertainty in the description of the land is given as the radical defect of the deed. So we are relieved from the necessity of examining the title of the execution of defendants, and must inquire whether this description is so uncertain as to make the conveyance worthless.

Nelson v. Brodhack.

There is nothing technical in this matter of description. As land can not be bodily delivered, it can pass only by such descriptions as will identify it; and if a deed contains any language, whatever the style, that will enable one to do so, it is so far good. It is not necessary that this description be contained in the body of the deed; but if it refers, for identification, to some other instrument or document, as to another deed or map, it is sufficient. Or, if no reference be made, surveys, monuments, etc., must be ascertained, in order to locate the land. But while there is no technical rule in regard to the description, and the intention of the parties governs, it must be contained in the instrument or its references, expressed or implied, with such certainty that the locality of the land can be ascertained from it. As, if the description were ten acres, being part of a certain lot, it is uncertain what part of the lot is meant; but if it were ten acres of said lot next south of Richard Roe, then it may be capable of measurement, after finding the lot and Richard Roe's land; and, in finding the lot, or any lines or boundary referred to, any proper evidence is admissible. (See *Kronenberger v. Hoffner et al.*, ante, 185.)

It should be premised that the same presumption of intentment can not be inferred from a sheriff's deed as from a direct conveyance by the grantor. In the latter case the ambiguity is the grantor's fault; he has voluntarily sold his property and received the proceeds, and everything should be construed more strongly against him than his grantee. Judge Napton, in *Hart v. Rector*, 7 Mo. 534, remarks that a sale by process of law should be governed by very different rules from those which apply to an ordinary conveyance. There is in the present case no especial equitable consideration that should induce us to give more effect to the deed than its face imports.

In the case at bar, can the advertisement be treated as part of the description? It certainly may, if it is referred to for that purpose, but in giving the description there is no reference whatever to it. Is then the recital of the notice any part of the description? or is it made to show upon what the levy was made, or for the purpose of showing that legal notice was given before

Rannells v. Flynn et al.

the sale? Clearly, to prove the fact of the notice. In referring, then, in the granting part of the deed "to the above-described real estate," would any one naturally suppose that anything was referred to but the actual description alone given in the recital of the levy? Would the advertisement be once thought of in endeavoring to find the land levied on, unless referred to for that purpose? It seems clear to me it would not, and the reference "to the above-described real estate" meant, and could mean only, the real estate actually above described, and that description, in no way referring either directly or indirectly to the advertisement, is not modified or controlled by it. I have examined all the authorities referred to by plaintiff's counsel, and find none that will go the length of his claim, even in private deeds.

The judgment should be affirmed. Judge Currier concurs; Judge Wagner absent.

CHARLES A. RANNELLS, Respondent, *v.* JAMES FLYNN and THE
CITY OF ST. LOUIS, Appellants.

1. *Practice, Civil—Assignment of errors—In absence of, judgment affirmed.*—Where appellants neglect to file an assignment of errors, the judgment of the court below will be affirmed.

Appeal from St. Louis Circuit Court

Glover & Shepley, for respondent.

R. M. Field, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The appellants have failed to assign errors in this court, and the respondent now moves the court to affirm the judgment.

The motion will be sustained and the judgment affirmed. The other judges concur.

[CONTINUED TO VOL. XLV.]

INDEX.

A

ACCOUNT STATED.

1. *Practice, Civil—Account, balance of, when treated as an account stated.—*

Where defendant acknowledged his indebtedness for a specific sum, being a balance of an account, the court was at liberty to treat it as an account stated, and properly gave judgment for such balance, although the account was not itemized. And where appeal is taken by reason of such objection to an account, this court will award ten per cent. damages against appellant.—*May v. Kloss*, 300.

ACCOUNT, STATEMENT OF.

See PRACTICE, CIVIL—ACTIONS, 3. PRACTICE, CIVIL—PLEADING, 9.

ADMINISTRATION.

1. *Partnership—Administration—Surviving partner—Partnership articles—*

*Covenant for conveyance in—Record of final settlement—Res adjudicata—Account of profits.—*A., being the owner of certain real estate with improvements, covenanted, in articles of partnership with B., that on receipt from B. of one-half the amount paid for the property, with interest, and half the running expenses, he would convey to him an undivided half of the property. On decease of A., B., as surviving partner, administered on the joint estate. Held, that the record of final settlement in the Probate Court, showing a balance of partnership payments in favor of B., was not conclusive evidence that the amount necessary to entitle him to a conveyance had been paid. It was not within the scope and purpose of final settlement to determine such questions. Such a covenant and the payments made in accordance with it were individual, and not partnership, transactions. The conveyance in such case certainly should not be enforced when no accounts were rendered by the administrator of the profits of the estate.—*Fish v. Lightner*, 268.

2. *Administrator, bond of—Suit on may be brought against, prior to order of*

*distribution, when.—*The heirs may institute proceedings against an administrator for a breach of his bond prior to an order of distribution by the Probate or County Court, whenever it is ascertained that the debts of the estate have been paid. In such case the heirs have a direct vested legal interest, and ought not to be prejudiced by the default of the administrator, or the remissness of the court in discharging its proper functions.—*State ex rel. Midgett v. Matson*, 305.

3. *Administrator—Final settlement of, lapse of time after—What presumption*

*afforded by as to unsatisfied claims.—*The lapse of eight years after a final settlement by an administrator leads inevitably to the inference that there were then no creditors holding unsatisfied claims against the estate.—*Id.*

ADMINISTRATION—(Continued.)

4. *Administrator—Property stolen from—Not responsible for in equity.*—Where funds belonging to an estate are stolen from the executor or administrator while in his charge, he can not in equity be held liable; and in such case an equitable defense may be made to an action at law. The suit will be tried by a jury instead of the chancellor. But his right to the equitable defense remains. And he will be permitted to testify in his own behalf, under the statute (Gen. Stat. 1865, ch. 144, § 1), and independently of it, under the common law.—*State ex rel. Townshend v. Meagher*, 356.
5. *Administrators are liable, for what care.*—Executors and administrators stand in the position of trustees of those interested in the estates upon which they administer, and are liable only for want of due care and skill; and the measure of care and skill required of them is the same as that demanded of bailees for hire, viz: that which prudent men exercise in the direction of their affairs.—*Id.*
6. *Administrator—Competency of as a witness—Construction of section 1, chapter 144, Gen. Stat. 1865.*—Under section 1, chapter 144, Gen. Stat. 1865, where the testimony of one of the parties to the transaction, or cause of action, or matter of defense, was placed beyond reach by death or insanity, the testimony of the other party was shut out, so as to preserve, as far as possible, an equality of position between them, and for no other reason. And in respect to a case where property in the charge of an administrator, belonging to the estate, is stolen, no testimony being lost by reason of the death of the intestate, the administrator is not within the reason of the exceptions named in the section, and is not excluded from testifying because of it.—*Id.*
7. *Administrator—Judgments presented more than one year after death, classed how.*—Judgments exhibited against the estate of a deceased person in the Probate Court, more than a year after his death, under section 1, chapter 123, Gen. Stat. 1865, should be placed in the sixth, and not in the fourth, class. The term "all demands," spoken of as belonging to the fifth class, means "all demands except judgments;" and the same term, when it refers to those embraced in the sixth class, means "all demands, including judgments," and, perhaps, also those named as belonging to the first and second classes. Sections 2 and 11, *et seq.*, chapter 124, and section 29, chapter 123, Gen. Stat. 1865, clearly show that no demand requiring presentation and allowance can be placed in or forward of the fifth class unless presented within the year.—*Bank of State of Missouri v. Tutt*, 366.
8. *Administrator—Certificate of deposit, liability on—Principal and agent.*—When goods were to be paid for by depositing the amount in a certain bank to order of the vendee, but, by mistake, it was deposited in the name of his agent, such deposit was a discharge of the vendee; and the administrator of the agent's estate was liable for the sum to the principal, even though, under a misapprehension of the rights of claimants, he may have paid it to another party. He should have inventoried the certificate of deposit, and left the court to determine to whom the money belonged.—*McCrary v. Ashbaugh, Adm'r of McCormick*, 410.
9. *Probate Court—Fraudulent conveyances.*—The Probate Court has no power to set aside a conveyance of deceased on the ground of fraud.—*Merry v. Fremont*, 518.

ADMINISTRATION—(Continued.)

10. *Administrator—Fraudulent conveyances.*—A conveyance can not be impeached by the administrator of the grantor as being fraudulent on the part of the grantor.—*Id.*
11. *Administrator—Fraud—Parties.*—An administrator is not a proper party to a suit to set aside a conveyance of the deceased as being a fraudulent act of the deceased.—*Id.*

See PRACTICE, CIVIL—PLEADING, 11. SECURITIES, 1, 2.

AGENCY.

1. *Administrator—Certificate of deposit, liability on—Principal and agent.*—When goods were to be paid for by depositing the amount in a certain bank, to order of the vendee, but, by mistake, it was deposited in the name of his agent, such deposit was a discharge of the vendee; and the administrator of the agent's estate was liable for the sum to the principal, even though, under a misapprehension of the rights of claimants, he may have paid it to another party. He should have inventoried the certificate of deposit, and left the court to determine to whom the money belonged.—*McCrary v. Ashbaugh, Adm'r of McCormick, 410.*
2. *Equity—Agent—Purchase of property of principal by, forbidden.*—An agent can not be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation.—*Grumley v. Webb, 444.*
3. *Equity—Agent, while in fiduciary capacity, can not interfere with title to the trust property.*—An agent who, for a certain remuneration, undertook to collect the rents and exercise control over the property of his principal while the latter was absent and relied entirely on his discretion, judgment, and integrity, had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. By purchasing the property under such circumstances, he made himself liable as a trustee in relation thereto, for the benefit of his principal.—*Id.*
4. *Equity—Sale—Purchaser—False representations by—Constructive trusts.*—Where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain—as, by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtained it at a sacrifice—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (*McNew v. Booth, 42 Mo. 189.*)—*Id.*
5. *Agent—Liability of principal.*—The same degree of negligence which unfits a party for employment in the first place will equally unfit him for a continuance therein, his negligent conduct being known to his employer.—*Harper v. Indianapolis & St. Louis Railroad Company, 488.*
6. *Agency—Commissary vouchers, when stolen, what title passes to purchaser.*—An U. S. commissary voucher is not, in the commercial sense, a negotiable instrument, and the law merchant has no application to it. It is,

AGENCY—(Continued.)

however, property, or rather a convenient representation of property, and when actually sold, passes by delivery, like other personal property. But the purchaser can acquire no greater right than the seller, and when the property is stolen, there can be no further transfer. An agent who collects the money on such a voucher, for an innocent purchaser thereof after the voucher has been stolen, will be liable for its value to the original owner. A sale of the property by the agent is evidence of conversion; and, to hold him liable, it is not necessary that he should use the proceeds of the conversion for his own benefit.—*Koch v. Branch*, 542.

7. *Agency—Conversion—What constitutes.*—The fact that one takes possession merely of stolen property, as a depositary or common carrier, is not sufficient to charge him with conversion. Some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some other intermeddling, inconsistent with the owner's right, should be found, in order to make the person responsible who has obtained innocent possession.—*Id.*

See CONVEYANCES, 6.

AMENDMENTS.

See PRACTICE, CIVIL—TRIALS, 11. PRACTICE, CIVIL—APPEALS, 2.

APPEALS.

See PRACTICE, CIVIL—APPEALS.

ARBITRATION AND AWARD.

1. *Arbitration and award—Appraisal—Insurance companies.*—Certain insured goods being damaged by fire, the owner and the insurance company, in pursuance of the provisions of the policy, agreed in writing upon a board of appraisers to examine the injured goods and estimate the owner's loss. This was done, but the appraisers were not sworn: *held*, that the transaction was not, in the accepted legal sense of the term, a submission to arbitration, but merely an appraisal, and for the reason that a submission to arbitration presupposed contesting parties and a subsisting controversy; whereas, in the case indicated, the original agreement fixing the method of ascertaining the *quantum* of damages in case of loss, formed a part of the original contract of insurance, viz.: of the company's charter, which was made part of the policy; and further, because by the terms of that instrument the finding of the appraisers was to be a report, to be used as evidence touching the loss, and not, as in case of an arbitration, as a bar to a suit on the policy. In such case the written agreement entered into after the fire, appointing the appraisers, and by which the parties agreed to accept their appraisal, was a practical carrying into effect of the stipulations of the policy.—*Zallee v. Laclede Mutual Fire and Marine Insurance Company*, 530.

2. *Arbitration and award—Appraisal—Insurance Policies—Distinction between arbitration and appraisal.*—Where the stipulations of a fire insurance policy have actually been complied with, and appraisal of losses had in conformity thereto, the insurance company and the insured should be bound by the result, notwithstanding that the appraisers were not sworn. They acted as appraisers, and not as arbitrators. The reference to them was not a submission to arbitration, in a legal sense, for the purpose of settling and extinguishing a cause of action, but a just and reasonable mode of fixing

ARBITRATION AND AWARD—(Continued.)

values—the value of the injured goods before and after the fire, the difference representing the amount of loss or damage.—*Id.*

See PRACTICE, CIVIL, 8, 9, 10, 11, 14, 15.

ASSIGNMENTS.

See CORPORATIONS, 1, 4, 5.

ATTACHMENT.

1. *Mortgages and deeds of trust — Attachment — Unrecorded mortgages, when good against.*—An unrecorded mortgage on land is good against the lien of a subsequent attachment thereon, if recorded before judgment and execution sale in the attachment suit. (Davis v. Ownby, 14 Mo. 170, and Valentine v. Havener, 20 Mo. 133, affirmed; *vide* also, Potter v. McDowell, 43 Mo. 93.)—*Reed v. Ownby*, 204.
2. *Attachment bond, suit on — Delivery of goods — Declaration of vendor proper.*—In a suit on the bond of an attaching plaintiff, by the claimant of certain household furniture, which had been levied on, declarations of the vendor at the time of the sale, concerning his intention of leaving the house, are competent as bearing on the question of fraud and that of delivery.—*State, to use of Heed, v. King*, 238.
3. *Attachment bond, action on — Pleadings — Verdict — Judgment — Exceptions to, when must be taken.*—In an action on an attachment bond, under sections 2 and 4 of act of March 3, 1855 (Sess. Acts 1855, p. 464), plaintiff's petition was drawn on the supposition that the party to whose use the bond was given, and not the State of Missouri, was plaintiff, and verdict and judgment were rendered for him accordingly. No exceptions were taken to the pleadings, verdict, or judgment, either in the lower courts or by assignment of errors. *Held*, that the defects were wholly formal, and noticed too late in this court. In such case, the judgment below is as complete a bar as though entirely formal.—*Id.*
4. *Attachment — Non-residence — Notice, under act of 1855, should state the amount claimed.*—Where attachment was levied on certain land of defendant, on the ground of his non-residence, notice of the suit stating that the proceedings were "founded upon two promissory notes for the sum of \$386.94," embraced a sufficient statement of the nature of the demand, under section 23, chapter 12, R. C. 1855; but is defective, under that section, in not stating whether the sum named in the notice was the amount claimed by plaintiffs; and execution issued on attachment based on such notice may be quashed.—*Haywood v. Russell*, 252.
5. *Attachment — Non-residence — Notice, last publication of, how long before next term.*—Under the provision of 1855, concerning notice of attachment (R. C. 1855, ch. 12, § 23), it is not necessary that the commencement of the publication should be eight weeks before the next term of court, nor that the four weeks should end four weeks before the next term. It is sufficient if the publication be four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term.—*Id.*

See GARNISHMENT. JUDGMENT, 1.

ATTORNEY AT LAW.

1. *Attorney at law—Professional services, value of, a question of fact.*—The jury are the proper judges of the value of professional services rendered by an attorney at law; and, without some misdirection by which they were misled, there is no occasion for interference in their verdict by the Supreme Court.—*Rose v. Spies*, 20.

B

BAILMENT.

1. *Bailee, care to be exercised by.*—The care to be exercised by a bailee over property in his charge must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto.—*State ex rel. Townshend v. Meagher*, 356.
2. *Practice, Civil—Actions—Bailment—Property stolen—Proper diligence.*—In an action of trover for a certain belt and its contents, where defendant was bailee without reward, the mere fact that it may have been stolen while in defendant's keeping, without his knowledge, is no defense. To excuse its non-production, it must appear that it was lost without defendant's negligence or fault.—*Huxley v. Hartzell*, 370.
See AGENCY.

BANKS AND BANKING.

1. *Revenue—Act of Congress—Bank shares—Taxes—Assessments made, how.*—Under the provisions of section 41 of the act of Congress of June 3, 1864, re-enacting and amending the act of February 25, 1863 (U. S. Laws 1863-4, p. 112), the county collector should make his assessments for taxes on bank shares against the shareholders personally, and has no right to collect the tax by selling the property of the bank, or the shares or other property of the shareholders, except that of the delinquent.—*First National Bank of Hannibal v. Meredith*, 500.
2. *Revenue—Banks—Act of Congress—Illegal tax—Injunction, when proper.*—Injunction by a bank organized under act of June 3, 1864, to restrain the collection of taxes, is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief.—*Id.*
3. *Revenue—Banks, under act of Congress of June 3, 1864—Assessments against banks for taxes on shares—Injunction—Demurrer.*—Suit by a banking institution organized under act of Congress of June 3, 1864, to enjoin the collection of taxes assessed against itself on its bank shares, has no equity. The bank, as a corporation, will lose nothing if the shares of its stockholders are sold. The shareholders are the ones who suffer, and they, if any one, are entitled to relief. In such suit demurrer will properly lie for that reason.—*Id.*

BANKRUPTCY.

See DOWER, 5.

BILLS AND NOTES.

1. *Bill of exchange—Equity—Debt, assignment of—Evidence.*—A bill of exchange drawn by a creditor upon his debtor does not of itself operate as an assignment in equity of the debt, even where negotiated for a good considera-

BILLS AND NOTES—(Continued.)

- tion—although it is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawers, will vest in the holder an exclusive claim to the indebtedness.—*Bank of Commerce v. Bogy*, 13.
2. *Bill of exchange—Equity—Debt, assignment of—Intention of parties.*—Anything that shows an intention on the one side to make a present irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration; and when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it—especially if advanced at the time, with no circumstances indicating any remaining interest in the drawer—the order should be treated as evidence of an equitable assignment.—*Id.*
 3. *Bills and notes—Statute of limitations—Indorsements of credit, effect upon.*—The time when the indorsement of a credit on a note was made is a fact to be settled by the jury, and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date, and the burden of proving the date to be false lies with the other party. But if the date does not purport to be made contemporaneously with the receipt of the money, it is inadmissible as a part of the *res gestæ*.—*Carter, Adm'r of English, v. Carter*, 195.
 4. *Bills and notes—Statute of limitations—Credits indorsed upon, when evidence of part payment.*—In an action by an administrator upon a note made to his intestate more than ten years before, the indorsement of a credit thereon by the intestate, nearly two years before the note expired by limitation, would be *prima facie* evidence that he had received part payment on the note. Such indorsement was clearly admissible, because against the interest of the deceased.—*Id.*
 5. *Bills and notes—Lands—Notes given for purchase money; deed of trust to secure—Verbal agreement to buy in land under given condition—Suit on notes, etc.*—Where the vendee of land paid a portion of the purchase money, and for the remainder gave his notes, secured by deed of trust on the property, testimony simply showing that the vendor expressed his willingness to exchange the notes for the land in case he could get a good title without a sale under the deed of trust, and that the property was sold six months after by the trustee, and bought in by the vendor, without showing any connection between the events, would not prevent the vendor from recovering judgment upon the notes, notwithstanding the apparent hardship to defendant of such a proceeding.—*Parker, Executor of Block, v. Garnhart*, 202.
 6. *Notes—Fraud and deceit—Settlement should be repudiated before commencing proceedings on original claim.*—Defendant was sued for the services of a slave. He denied the indebtedness, but, to avoid a controversy, “squared off” by giving plaintiff a certain note on which sundry payments had been indorsed. Plaintiff took the note without examination, collected the money, and pocketed the proceeds. Because it turned out that the amount due on the note was less than plaintiff's claim, he could not treat the claim as unadjusted, and sue for the balance, on the plea of fraudulent misrepresentation by defendant concerning the amount remaining due on the note. Before

BILLS AND NOTES—(Continued.)

commencing proceedings on his original claim, he should have tendered back the note received of defendant, and should have repudiated the settlement; or he might have prosecuted directly for the deceit, abandoning entirely his original cause of action. In that case he could retain the note, and recover, in addition, all he had suffered by the deception.—*Jarrett v. Morton*, 275.

7. *Bills of exchange, action on—Failure of notice of dishonor, excuses for—Burden of proof.*—In an action against the drawer of a bill of exchange, who had received no notice of its dishonor, it was sufficient for plaintiff, in order to bring his case *prima facie* within the rule which excuses want of notice, to allege in his petition that defendant had no funds in the hands of the drawee; and if there are other facts in the knowledge of defendant neutralizing the effect of this excuse, the burden of pleading them is with him.—*Merchants' Bank v. Easley*, 286.
8. *Bills of exchange, action on—No funds in hands of drawee—Accommodation drawer—Presumptions.*—In an action against the drawer of a bill of exchange, he would be entitled to notice of dishonor, even though he had no funds in the hands of the drawee, if he were an accommodation drawer. But in the absence of countervailing testimony, he will be presumed to be an interested party. The *onus* of proving the contrary is upon him.—*Id.*
9. *Bills and notes—Reasonable time, what is.*—The presentment of a draft to the drawee must be made in a reasonable time. What is a reasonable time is a question of fact, and depends upon the circumstances of the case.—*Fugitt v. Nixon*, 295.
10. *Bills and notes—Insolvency of maker—Want of presentment and demand.*—As between the holder of negotiable paper and the prior parties thereto, the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of presentment and demand.—*Id.*
11. *Bills and notes—Dishonor, notice of—Diligence, when question of law; when of fact.*—What is due diligence, in giving notice of dishonor, is a question of law when the facts are admitted. Where the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury.—*Id.*
12. *Bills and notes—Dishonor of—Reasonable diligence must be had in ascertaining residence of party to be notified.*—When the residence of the party to be notified of the dishonor of a bill of exchange is unknown, it is incumbent on the holder, and all other parties who are bound to give notice, to use reasonable diligence and make due inquiries as to the residence of the party so entitled to notice. What will be due and reasonable diligence in this respect must depend on the circumstances of the particular case.—*Id.*
13. *Bills and notes—Dishonor, notice of—Laches only imputable in giving, where residence of indorser is ascertained.*—The time employed in endeavoring to find the residence or address of the indorser must be deducted; and laches are only imputable to the holder after failure to give notice, where the residence or address is ascertained.—*Id.*
14. *Bills and notes—Dishonor—Notice of, where the indorser can not be found.*—In case the whereabouts of the indorser of negotiable paper can not be ascertained, if an agent is employed to give the necessary notice at the town where he is about to stop, immediately upon his arrival, this is sufficient diligence.—*Id.*

BILLS AND NOTES—(Continued.)

15. *Bills and notes — Presentment — Reasonable time.*—The general rule in regard to presentment is that the bill must be presented within a reasonable time; and what will be a reasonable time must depend upon all the circumstances of each particular case.—*Salisbury v. Renick*, 554.
16. *Bills and notes — Presentment — Reasonable time.*—A. purchased of B., at St. Louis, on the 9th of June, a bill of exchange on C., in New York, with the understanding that the bill might be cashed by A. while in New York, or returned and repurchased by B. at the option of A. No limit of time for the return of the bill was fixed upon. It was never presented to C., but was returned, for payment, to B. the 16th of October. Meanwhile, in August, C. had failed, and B. refused payment. *Held*, that the bill was not presented to B. within a reasonable time, and that he was not liable.—*Id.*
17. *Bills and notes — Agreement to return draft to drawer, if not used — Reasonable time.*—Where no time is specified within which a bill of exchange shall be returned to the drawer if not used, the law will imply a reasonable time.—*Id.*
18. *Bills and notes — Promise to pay, with full knowledge of laches — Effect of.*—The law seems to be well settled in this country that where no demand for the payment of a bill of exchange has been made, or notice of non-payment given, a promise to pay after maturity, with full knowledge of such laches, is binding on the party promising, and removes entirely the effect of any negligence in making the demand or in giving the notice.—*Id.*
See CONTRACTS, 9. CORPORATIONS, 4. EQUITY, 8. PRACTICE, CIVIL—PLEADING, 20.

BOATS AND VESSELS.

1. *Boats and vessels — Seamen — Wages — Forfeiture — Entirety of contract — Variance.*—If a seaman enters into an engagement for a specified voyage, and the boat or vessel is disabled before reaching the port of delivery, and another vessel is chartered or substituted in its stead, it is his duty to proceed on such substituted vessel. But where there is no substitution, but the freight is simply transhipped to another vessel bound for the same destination, it is unjust and unreasonable to say that the crew can be forced to go and serve on the boat which takes the freight from the one disabled, or else forfeit their whole pay.—*Rebetto v. How*, 52.

BONDS.

See CONTRACTS, 5. CORPORATIONS, 4, 5. REVENUE, 12, 13, 14. SURETIES, 1, 2, 3, 4.

BOUNTIES.

1. *Military bounties — Buchanan county — County Court — Orders, construction of — Right of volunteers to balance of bounty money.*—Under authority of an act of the General Assembly (Sess. Acts 1863-4, p. 39), the County Court of Buchanan county, on the second day of August, A. D. 1864, made a general appropriation of the sum of \$120,000, to be applied to the payment of bounties to soldiers credited to the enrollment of the county. Subsequently, on the twentieth day of the same month, said court adopted a further order establishing a bounty of \$200 to be paid to volunteers credited to the county under the "late call." The United States made four "calls" for troops in the year 1864—in February, March, July, and December, respectively. *Held*, that a

BOUNTIES—(Continued.)

soldier who volunteered under the December call was not accredited to the county under the "late call," within the meaning of the order, and was, therefore, not entitled to bounty under that order. Under these circumstances, the fact that a balance of the appropriation remains undisposed of does not give a soldier enlisted under the December call any legal interest in such balance. —*Watson v. Buchanan County*, 422.

BUCHANAN COUNTY.

See **BOUNTIES**, 1. **ELECTIONS**, 7, 8. **OFFICERS**, 3. **ST. JOSEPH, CITY OF**, 1.

BURDEN OF PROOF.

See **BILLS AND NOTES**, 7. **QUO WARRANTO**, 1.

C**CAIRO AND JOHNSONVILLE PACKET COMPANY.**

See **CORPORATIONS**, 1.

CARRIERS.

See **AGENCY**.

CLARK COUNTY.

1. *Clark county — Removal of county seat — Construction of Sess. Acts 1865, p. 312, and R. C. 1855, p. 514, ch. 45.*—It would seem to have been the obvious purpose of the Legislature, in the sixth section of the act to re-locate the county seat of Clark county (Sess. Acts 1865, p. 312), to adopt the machinery provided by the act of 1855 (R. C. 1855, p. 514, ch. 45), where that machinery was not superseded by the express provisions of the former act. The two acts taken together must be understood and construed as providing that the County Court of Clark county should act on the petition of a majority of the legal voters of that county, and appoint five commissioners to select a site for the public buildings "within two miles of said town of Cahoka," and to do whatever else the act of 1855 required of them, not at variance with the act of 1865; and that when the commissioners had made the selection, and discharged the duties devolved upon them in this behalf, the County Court should order the removal of the county seat to the selected locality.—*Spangler v. County Court of Clark County*, 207.

COLLECTORS.

See **OFFICERS. REVENUE.**

COMMON LAW.

See **CRIMES AND PUNISHMENTS**, 3, 6, 9.

CONGRESS.

See **BANKS AND BANKING**, 1, 2, 3.

CONSIDERATION.

See **CONTRACTS**, 2, 3, 4. **CORPORATIONS**, 4. **EXECUTIONS**, 4. **PRACTICE, CIVIL—PLEADING**, 14, 15.

CONSTABLE.

See **JUSTICES' COURTS.**

CONSTITUTION OF MISSOURI.

1. *Constitution — Section 32, art. IV.—Intention of.*—Section 32, art. IV, of

CONSTITUTION OF MISSOURI—(Continued.)

the State constitution was intended to effectually inhibit the putting of diverse subjects in the same bill.—State v. Mathews, 523.

2. *Act of December 11, 1863, in the nature of an act of attainder—Article II, of constitution in force in 1863.*—The act of December 11, 1863 (Adj. Sess. Acts 1863, p. 645), ousting the board of curators of St. Charles College for having failed to take and subscribe the oath required by the act of March 23 (Sess. Acts 1863, p. 12), assumed, without judicial findings, that the board of curators had forfeited their position; it cut off any defenses which they might make upon a trial of their right to office, declared vacancies which had not been created, and proceeded to fill them. It was, therefore, in the nature of a bill of attainder, and equally unjust and odious, and unknown to our jurisprudence. Such judicial action was also expressly guarded against by article II of constitution, in force in 1863, which prohibited the union of the legislative and judicial power.—State ex rel. Pittman v. Adams, 570.

3. *Constitution—Act of Legislature declaring forfeiture—Legislative judgments.*—The recitals in a statute will in general be taken as correct. But an act declaring a forfeiture, if outside of legislative authority, can not be strengthened by reciting facts that might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment, but the question of forfeiture is strictly judicial. And the Legislature can not constitutionally know either that the facts exist or their legal effect.—*Id.*

See INSURANCE, 3. PRACTICE, CRIMINAL, 8. REVENUE, 12, 13, 14.

CONSTITUTION, UNITED STATES.

See INSURANCE, 5. ST. CHARLES, CITY OF, 1, 7, 8.

CONTRACTS.

1. *Evidence—Bonds—Sureties—Admissions of principal.*—Admissions made before the execution of a bond by one who afterward executed it as principal, and which were not made in the progress of any business intrusted to him by the surety, and formed no part of the *res gestæ* of the subject matter of the suit, are not evidence against the surety on the bond, and should not be admitted in a suit on the bond against the surety. The statements made by the principal, at the time the bond was executed, in the presence of the other parties, and as a part of that transaction, stand on a different footing, as would any statement made by him in the progress of fulfilling the conditions of the bond.—Cheitenham Fire-Brick Company v. Cook, 29.
2. *Contracts—Illegal consideration—Compounding a felony—Knowledge of crime, when necessary to make consideration illegal—Construction of statute.*—Where a criminal prosecution had been initiated, by the owners of the money taken, against a defendant for embezzlement, and the defendant in such prosecution, with another person as principal, executed a bond to refund the money embezzled to the owners, upon an agreement, express or implied, by the owners or their agent, to compound and cancel said crime and abstain from any prosecution therefor, it was not necessary, in order to establish the illegality of such consideration, to allege or prove that the obligees in the bond, who had initiated the criminal prosecution, had knowledge that a crime had in fact been committed. The statute (Gen. Stat. 1865, p. 801, § 15) has no

CONTRACTS—(Continued.)

application to such a case. It makes certain acts offenses, and provides the mode and measure of punishment for the wrong-doer; but it was not intended to legalize contracts which were void at common law, as against public policy, and of unsound tendency and character. But where no prosecution has been instituted, it is necessary to allege the fact that a crime has been committed, and that a party taking an obligation in consideration of forbearance to initiate a prosecution had knowledge of the existence of the supposed crime. —*Id.*

3. *Contracts—Consideration—Illegality of, how determined.*—Whether an obligation is tainted with an illegal consideration, and void for that reason, is a question to be determined by common law, and not by the statute.—*Id.*
4. *Contracts—Validity—Good consideration unaffected by an illegal agreement.*—If a bond, given by one who has embezzled money to its owners, is given to secure the said money to the owners, and in consideration of that indebtedness and of the agreement on the part of the creditors to give an extension of time in which to make payments as therein expressed, unaffected by any agreement or understanding by the obligees on the bond or their agent that a criminal prosecution pending against the principal in the bond for such crime should, in consequence, be abandoned, and no other commenced, then there is no objection to the bond as far as the consideration is concerned.—*Id.*
5. *Bond—Trust—Practice, Civil—Parties.*—Where a bond is executed for the payment of money to the obligee, part for his own use and part for the use of another, the obligee may sue in his own name, on his own behalf and as trustee for the other. A payment to the obligee, in accordance with the bond, of any money due to the *cestui que trust* would be a satisfaction of the demand, and the obligors in the bond could not be called upon to account again.—*Id.*
6. *Boats and vessels—Seamen—Wages—Forfeiture—Entirety of contract—Variance.*—If a seaman enters into an engagement for a specified voyage, and the boat or vessel is disabled before reaching the port of delivery, and another vessel is chartered or substituted in its stead, it is his duty to proceed on such substituted vessel. But where there is no substitution, but the freight is simply transhipped to another vessel bound for the same destination, it is unjust and unreasonable to say that the crew can be forced to go and serve on the boat which takes the freight from the one disabled, or else forfeit their whole pay.—*Rebetto v. How*, 52.
7. *Contracts—Sales—Custom merchant, how established; when binding—Evidence.*—A custom, to be good, must be general, uniform, and notorious, and, to be binding on the parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed; and evidence which does not tend to establish any open, uniform, and notorious rule, but simply consists of the declarations of witnesses as to what their individual opinions are, and the obligations they should have deemed resting upon them in certain circumstances, is illegal, and should be excluded.—*Southwestern Freight and Cotton Press Company v. Stanard*, 71.
8. *Contracts—Established custom, evidence of, for what purpose admissible; force of.*—Where a contract is made as to a matter about which there is a well-established custom, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the inten-

CONTRACTS—(Continued.)

- tion of the parties in all the particulars which are not expressed in the contract. But evidence of custom is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law.—*Id.*
9. *Sales—Orders—Negotiable instruments.*—Where the vendor of goods delivered to the vendee an order on the vendor's mill, in words and figures following, viz: "Eagle Mills, deliver to Lamb & Quinlin 200 barrels Eagle Steam flour. St. Louis, October 1st, 1867. E. O. Stanard"—*held*, that the order was not negotiable, and that the vendees could not assign to other parties any greater or different right than such vendees possessed.—*Id.*
10. *Contracts—Sales—Statute of frauds—Right of property, what sufficient to pass.*—If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right does not attach to the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price.—*Id.*
11. *Contracts—Sales, presumed to be for cash unless the contrary is stipulated.*—When nothing is said between a vendor and vendee as to payment, and where no time is stipulated for payment, it is understood to be a cash sale, and payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment be not immediately made, the contract becomes void.—*Id.*
12. *Contracts—Sales—Constructive delivery—Right of possession—Vendor's lien—Non-payment—Insolvent buyer.*—Even if the title has passed and the goods have been constructively delivered, possession could not have been coerced till payment was made, if the vendor has not surrendered possession. While he retains it his lien exists, and, though there may be a delivery which will pass the title, it will not necessarily destroy the lien. Unless credit is expressly given, which is a waiver of any right to demand immediate payment, the lien will continue to exist. So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver even when credit has been given.—*Id.*
13. *Contracts—Sales—Delivery and acceptance, when a question for the jury.*—In doubtful cases the question of delivery and acceptance is for the jury, under instructions from the court. But where the facts are clear and undisputed, what will amount to a delivery and acceptance, or waiver or destruction of lien must be determined by the court.—*Id.*
14. *Contracts—Infants—What contracts void and what voidable.*—The contracts of infants for necessities, such as shelter, food, and clothing proper for their station, and such other means of support and education as may be requisite for them, are valid and obligatory. But, generally, their promises in any business transaction, though not absolutely void, are voidable by them. And the contract of partnership may be made by an infant for his own benefit, subject to his right to avoid it when he comes of age.—*Kerr v. Bell*, 120.
15. *Contracts—Rescission—Infants—Consideration.*—An infant vendor may recover back his property, either real or personal; but in such a case he must refund what he has received. There can be no such right of recovery so long as any part of the consideration is withheld.—*Id.*

CONTRACTS—(Continued.)

16. *Contracts—Real estate, sale of—What acts an abandonment of.*—Where, after the sale of certain land, the vendor received back the possession of it, rented it out, enjoyed the rents and profits, exercised exclusive and absolute ownership over it, advertised it for sale, and had the title vested in himself, such acts will be held to be an abandonment by him of the sale.—*Id.*
17. *Contracts, interpretation of—Determined from obvious intention, as derived from all parts.*—Mere verbal criticism should not be resorted to in interpreting contracts or legal proceedings. Courts should be governed by their obvious intention, as derived from all parts of the instrument or record.—*Caldwell v. Layton*, 220.
18. *Contracts—Sheriffs' sales—Parol testimony as to declarations of sheriff at time of, how shown.*—Parol testimony as to declarations of the sheriff at the time of a partition sale, in order to explain the meaning of his deed, is improper, because its introduction is an attempt, collaterally, to impeach the record. The sale could have been set aside for cause by a direct proceeding in the same court, and, in such case, parol testimony of anything that occurred at the sale would be admissible.—*Id.*
19. *Contract—Sale, conditional—Purchase from vendee by third party—Title—Replevin.*—By the terms of a written contract, A. agreed to sell B. a certain engine for a specified sum; and B. agreed to return the same in default of payment within six months. B. took possession of the property, and, before the expiration of the time or the payment of the money, sold it to C., who purchased without notice of the rights of A. Suit in replevin was brought by A. against C. for the property. *Held*, that the contract was at best only a conditional sale, and no title vested in B.; and (in the absence of evidence showing laches in A.) C. acquired nothing by his purchase.—*Griffin v. Pugh*, 326.
20. *Contracts—Township—Power of, to make—Legislature—Townships* have no power by themselves to make independent contracts or to become bound in their separate capacity, and the law has not invested them with that power. But there is nothing to prevent the Legislature from doing so should it see fit.—*State ex rel. N. M. Central R.R. Co. v. Linn County Court*, 504. See **BILLS AND NOTES**, 5. **CONVEYANCES**. **CORPORATIONS**, 4, 5, 8, 13. **EQUITY**, 11, 12, 13. **LANDLORD AND TENANT**, 1, 2. **PARTNERSHIP**, 1. **PRACTICE, CIVIL—PLEADING**, 9, 14, 15, 17. **SALES**. **USURY**, 1.

CONVERSION.

See **AGENCY**, 6, 7.

CONVEYANCES.

1. *Deeds—Description by quantity, by metes and bounds.*—A call for quantity in a deed must yield to a more definite description by metes and bounds.—*Campbell v. Johnson*, 247.
2. *Deeds—Description by quantity, by metes and bounds—Latter should prevail.*—Without an express averment or covenant as to quantity of land in a deed, it will always be regarded as a part of the description merely; and will be rejected if inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but ordinarily does not control, the description of the granted premises.—*Id.*

CONVEYANCES—(Continued.)

3. *Deeds — Interpretation of — Intention of maker should be sought for — Inaccuracy — Patent ambiguity, deed void for.*—In the interpretation of deeds the intention should be sought after and carried out, and the identity of the land ascertained, by a reasonable construction of the language used. If the land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void. But to have this effect, and render the deed void for uncertain description, the ambiguity must be patent, and appear on the face of the instrument.—*Id.*
4. *Ejectment — Description — Deed — Patent ambiguity, how cured.*—Suit in ejectment was brought for "the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen," of Randolph county, embracing an area of forty acres. The only designation in the deed on which the suit was founded which would include this tract was "the southwest quarter of section eleven." A quarter-section contained four forty-acre tracts. *Held*, that there being nothing in the deed to show to which forty it applied, the ambiguity in the description was patent, and could not be removed by extrinsic evidence. The title to the tract should be perfected by an action to reform the deed.—*Id.*
5. *Conveyances, contracts for — Discretion of court as to specific performance.*—Petitions for a specific performance of a contract to convey land are addressed to the sound discretion of the court, which may withhold or grant relief according to the circumstances of each particular case, when general rules and principles fail to furnish any exact measure of justice between the parties.—*Fish v. Lightner*, 268.
6. *Fraudulent conveyances — Statute concerning — Sale — Change of possession, what constitutes — Clerk — Vendee of vendee.*—Under section 10, ch. 67, R. C. 1855 (*vide also*, Gen. Stat. 1865, p. 440, § 10), the vendee must take the actual possession; and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the vendor, that the goods have changed hands, and that the title has passed out of the seller into the purchaser. (*Claffin v. Rosenberg*, 42 Mo. 439.) Otherwise, the sale will be presumed fraudulent and void; and this notwithstanding that the vendor remained in charge as clerk or agent of the vendee. And it is immaterial that the claimant of goods attached, purchased them of the vendee of defendant in the suit. The last vendee stands in no better condition than the intermediate purchaser unless he has taken and continued in the actual possession of the purchased goods.—*Lesem v. Herriford*, 323.
7. *Deeds — Description — Patent ambiguity — Inaccuracy in, how cured.*—In an action of ejectment for certain land sold plaintiff under a deed of trust, the deed described it as "lot forty-six;" and a plat of the survey of the town where the land was situated being put in evidence showed that the town was laid off in lots and blocks, and that no lots were numbered as high as forty-six: *held*, that the ambiguity in the deed was patent, and that parol evidence was inadmissible to show that the deed was designed to convey block forty-six. If the description was inaccurate, and failed to express the intention of the parties, plaintiff should have applied to the grantor, or, in case of his refusal, to a court of equity, to have the deed reformed and the mistake corrected.—*Jennings v. Brizeadine*, 332.

CONVEYANCES—(Continued.)

8. *Deeds—Description, where certain, can not be contradicted by parol testimony.*—If, in a deed conveying premises, the description is certain, parol evidence of the intent, the acts, and declarations of the parties, going to establish a different location or another designation, is inadmissible, as contradicting or varying the deed.—*Id.*
9. *Deeds—Where intention of parties is plain on face of instrument, courts can go no further.*—If the will of parties to a deed be plain upon the face of the instrument, courts should go no further in determining its meaning, even though the words used frustrate the grant itself.—*Id.*
10. *Conveyance—Mortgage—Conditional sale—Difference between—Absolute sale with cotemporaneous stipulation.*—A conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the deed, or however absolute it may appear on its face; and where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of the mortgage. But it is not true that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein gives a cotemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, the transaction would be a conditional sale notwithstanding.—*Turner v. Kerr*, 429.
11. *Conveyance—Mortgage—Conditional sale—What constitutes difference between.*—In determining whether a transaction is a mortgage or a conditional sale, the understanding and purposes of the parties are to be considered. If they intended an extinguishment of the debt, and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms—as a payment of an amount equal to the canceled debt and interest—such a transaction is a conditional sale, and not a mortgage. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of debt and interest, is a circumstance of no controlling importance.—*Id.*
12. *Covenant—Indemnity.*—The words “grant, bargain, and sell,” contained in the statute (Gen. Stat. 1865, ch. 109, § 8), are a covenant that runs with the land, of indemnity, continuing to successive grantees, and inuring to the one upon whom the loss falls.—*Magwire v. Riggin*, 512.
13. *Conveyances—Covenants—Demands based on, should depend on subsisting estate.*—A demand arising from the covenants of a conveyance should depend upon some subsisting estate that would ripen into a right of possession and be made to operate an eviction unless discharged.—*Id.*
14. *Conveyances—Notice—Prior unrecorded deed—Consideration.*—To entitle a grantee of land, without notice, to protection against a prior unreserved conveyance, he must have parted with something of value as a consideration of the deed.—*Aubuchon v. Bender*, 560.
15. *Conveyances—Consideration—Record—Relinquishment of dower.*—The grantee, without notice, in a duly recorded deed, the sole consideration for which was the love and affection of the grantor, will not hold as against a prior unrecorded deed of the same property, the consideration of which was

CONVEYANCES—(Continued.)

love and affection, and also the relinquishment of dower by the wife of the grantor.—*Id.*

16. *Conveyances — Life estate — Remainder — Revocation — New uses.*—The grantor of land seized to his own use for life, can do nothing, while in possession, to impair an estate created by him in remainder, and, not having reserved the power, can neither revoke the estate in remainder nor declare new uses.—*Id.*
17. *Conveyances — Covenant — Contingent and vested remainders created by one deed.*—A covenant that creates both a vested and contingent remainder is unusual, but there seems to be no principle of law to prevent it.—*Id.*
18. *Conveyances — Covenant to stand seized to uses — Vested and contingent remainders.*—By the terms of a deed the grantor was to stand seized of certain property to his own use during his life; and, after his death, his title was to vest in five children in the deed mentioned, "and such other children in lawful wedlock by him begotten, as should be living at the time of his death." After making said deed, the grantor re-married. *Held*, that the children named in the deed had a vested, and those born of the subsequent marriage a contingent, remainder in the property.—*Id.*
19. *Conveyances — Contingent remainders — Child en ventre sa mere.*—A child unborn will now not only inherit all manner of estates, but take remainders, whether vested or contingent, as though living when the particular estate determined. The statute of 10 and 11, William III, ch. 16, adopted in this State in the revision of 1845 (p. 220, § 9), was but an affirmation of what had already become the law.—*Id.*

See EQUITY, 3. FRAUDULENT CONVEYANCES. LAND AND LAND TITLES.

CORPORATIONS.

1. *Cairo and Johnsonville Packet Company — Stockholders, liability of for unpaid subscriptions — Conditions of charter — Construction.*—The charter of the Cairo and Johnsonville Packet Company provided that before the company should proceed to the transaction of the business intended to be prosecuted, the sum of \$350,000 must have been paid in as well as subscribed. The business to be done was the construction of wharf-boats, steamers, etc., and the carrying on of a freight and transportation business. The grantees named in the charter were to constitute a board of commissioners "to open books for subscription to the capital stock of the company for such an amount as in their judgment the business of the company should require, but for no amount of subscription less than \$350,000." The charter further provides that within twenty days from the closing of the subscription the officers should be elected, and provides the manner of their election, their number, and term of office, and that the corporate powers of the company shall be vested in such officers. *Held*, that the company was warranted in organizing and attaining a corporate existence on the basis of a *bona fide* stock subscription of \$350,000. The provision that the company should not proceed with the contemplated transportation business until the \$350,000 had actually been paid in was for the benefit of those who might deal with the company—not for the benefit of stockholders, as a preliminary condition to the right to enforce collections of calls duly made upon the stock subscribed.—*McDermott v. Donegan*, 85.

CORPORATIONS—(Continued.)

2. *Corporations—Officers, election of—Presumptions.*—Officers of a corporation, in possession of their respective offices, are presumed to be regularly elected and entitled to hold until the contrary be shown.—State ex rel. Bornefeld v. Kupferle, 154.
3. *The "German Insurance Company," of St. Louis—Power of removal by directors.*—Under the twenty-second by-law of that institution, a majority of the *de facto* board of directors of the "German Insurance Company," of St. Louis, had a right to remove the secretary for sufficient cause, without formal notice of charges or trial; and until their action is impeached it is to be presumed that they acted on sufficient grounds.—*Id.*
4. *County bonds; Schuyler county railroad—Implied consideration—Not subject to equities in the hands of assignees.*—In proceedings for *mandamus* by the purchaser of certain bonds issued by Schuyler County Court to the North Missouri Railroad Company to enforce payment thereof: *held*, that although said bonds did not contain the words "value received, negotiable and payable without defalcation," as provided by the act concerning "bonds, bills, and notes" (R. C. 1855, ch. 21, §§ 2, 3), yet they imported a consideration and possessed the ordinary elements of negotiable instruments; and, in the hands of an innocent holder for value, before maturity, were not subject to antecedent equities. The act concerning bonds, etc., had in view classes of paper not usually employed in banking and commercial operations, and not adapted or intended for such uses. It was not meant to embrace bonds put in circulation as commercial securities, to be sold and used by a railroad company in defraying expenses of its road.—Barrett v. County Court of Schuyler County, 197.
5. *County railroad bonds—Subscription—Election—Ratification of, defects in.*—In a suit to enforce payment of bonds given by a county to a railroad company, in payment of subscriptions by the county to the stock of the company, although it appear that at the time the court authorized the subscription no election had been held to ascertain the sense of the tax-payers of the county in reference thereto, yet if it appeared that the county, by its duly authorized agent, voted on said stock subscription for more than twelve years, such action of the county was, for the purposes of this suit, a waiver of the defects in the original subscription. Moreover, the issue of the bonds, years after the time of the subscription, was a ratification thereof, and warranted a purchaser of them in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been complied with or waived.—*Id.*
6. *State Savings Association—Act for payment of, vouchers unnecessary.*—The act of March 4, 1869, appropriating a specified sum to pay the amount "due the State Savings Association, of St. Louis, for moneys advanced by said Association to Governor Gamble, September 2, 1862," is conclusive evidence of the indebtedness and its amount; and, under the law, no voucher or other evidence is necessary.—State ex rel. State Savings Association v. Draper, 245.
7. *Corporations—Granted powers, exercise of—Reasonableness of.*—Corporations can not go beyond the powers granted to them, and must exercise such granted powers in a reasonable manner. And courts must judge in each case before them, whether the exercise of the power be reasonable. A clear

CORPORATIONS—(Continued.)

- case should be made out to authorize an interference by them on the ground of unreasonableness.—*The City of St. Louis v. Weber*, 547.
8. *Corporations—St. Charles College—Amendment of charter impaired obligation of contract.*—By the charter of "St. Charles College," it was required to be "an institution, purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable or liberal-minded persons, whatever may be their religious opinions." The amendment of the charter, approved February 6, 1847 (Sess. Acts 1847, p. 226), provided that "the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South" should "be requisite in filling all vacancies in the board; upon the conference affording to the board satisfactory assurances for the maintenance and endowment of the college." *Held*, that the amendment, by requiring the concurrence in the choice of curators, of an ecclesiastical body representing one of the religious denominations of the State, endangered, in this regard, the principles of the foundation; and, even if it did not, it changed the character of the administrators of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impaired the contract upon which he advanced it.—*State ex rel. Pittman v. Adams*, 570.
 9. *Corporations, moneyed and charitable—Stockholders—Visitors.*—In moneyed corporations, the trustees have no general powers. They are simply the agents of the shareholders, and under their control. The law of visitation, as applied to charities, has no application to them. But in eleemosynary corporations there are no stockholders, and regulations that ordinarily are made by them, and disputes that are submitted to the courts, are made and decided by those intrusted with the visitorial power.—*Id.*
 10. *Corporations—Moneyed and eleemosynary—Visitors—Duties of.*—In this country, moneyed corporations composed of shareholders, for whose use and benefit the charter is granted, may, in general, accept amendments thereto. But in charities the corporators are not the owners of the fund; neither is it held for their use. Their consent would not affect their own property but that of others, and their office of visitors, so far from giving them power to authorize any change in its management and control, contrary to the will of the founder, imposes upon them rather the obligation of seeing that that will is made paramount.—*Id.*
 11. *Corporations—Visitors may consent to legislative change, when.*—Various changes may be found necessary in furtherance of the objects of a charitable institution which its visitors should have authority to make, or assent to, if such objects require an amendment to the charter. But if the general power of consent to legislative amendments is lodged in the directors or curators, there is no security whatever in eleemosynary grants.—*Id.*
 12. *Corporations, eleemosynary—Legislative amendments—Curators—Consent of.*—The curators of an eleemosynary institution, the grant of which by the Legislature is absolute, subject only to the conditions imposed, have no power over the charter, but on the contrary it is their creator and their absolute rule of conduct. The beneficial interest in the charity fund belongs

CORPORATIONS—(Continued.)

neither to them nor the State, but to the beneficiaries only, who, from the nature of the case, can not consent to any changes in the charter. Hence, its essential conditions are permanent, so far as change depends upon consent, and the acceptance of a legislative amendment to the charter of such an institution by its board of curators gives it no validity.—*Id.*

13. *Corporations—Officers, removal of, for disloyalty—Act of March 23, 1863, validity of.*—The Legislature of this State, pending the late contest, had power to take measures to remove from the management of corporations of a public nature those who came within the purview of the oath commonly called the convention oath. (*Vide* act of March 23, 1863, Sess. Acts 1863, p. 12.) The act was not a violation of the contract embraced in the charter, for fidelity to the State is embraced in every such contract. The duty of loyalty is antecedent, perpetual, and paramount; and, in granting a charter, the State can make no engagement to dispense with that duty.—*Id.*

14. *Corporations—Powers of amotion—Trial essential before amotion.*—The power of amotion is judicial in its character, and generally exercised by the courts of the land, though it may be given to the corporation by its charter, and, even if the charter is silent, an officer or corporator, in some classes of corporations, may be expelled for sufficient cause. But it is essential, in every case, that charges be made, a trial had, and that the accused be notified and have a full opportunity for defense.—*Id.*

See DAMAGES, 5, 6. INSURANCE. ST. LOUIS, CITY OF.

COUNTY SEAT, REMOVAL OF.

See CLARK COUNTY.

COURT, BUCHANAN COMMON PLEAS.

See ELECTIONS, 7, 8.

COURT, CIRCUIT.

See COURT, SUPREME, 3, 4, 5. ST. JOSEPH, CITY OF, 1.

COURT, CIRCUIT, ST. LOUIS.

1. *Mandamus—St. Louis Circuit Court—Time for filing exceptions—Construction of statute.*—The fourteenth section of the law organizing the St. Louis Circuit Court (Gen. Stat. 1865, p. 889) takes that court out of the operation of the general law (Gen. Stat. 1865, ch. 169, §§ 27, 28) permitting exceptions to be filed at any time during the term; and, by virtue of that special act, the St. Louis Circuit Court has power to prescribe the limitations for filing exceptions named in the 12th and 16th rules adopted by it, in the revision adopted January, 1863.—*State ex rel. Frank v. Smith*, 112.

COURTS, COUNTY.

1. *County courts—County roads, establishment of—Appeals on merits not inquired into.*—County courts alone have power to establish new county roads, change roads for purposes of cultivation, and vacate roads; and their discretion in these matters can not be reviewed by the Circuit or any other court. No appeal will lie, even as to assessment of damages, since the act of March 23, 1868. (Adj. Sess. Acts 1868, p. 158, § 53.) Any one directly interested may appeal to the Circuit Court on questions of law, under section 2, ch. 136, Gen. Stat. 1865; but the appellate jurisdiction given that court by the statute does not involve the right to review the discretion of the County

COURTS, COUNTY—(Continued.)

Court, or to pass upon anything but the legality of its proceedings. If the County Court has conformed to the law, as shown by its record, its action should be affirmed. The merits of the question can not be examined.—*Foster v. Dunklin*, 216.

2. *County courts — County roads — Petitioners for must pay what costs and expenses.*—The County Court is authorized to establish roads, with or without petition. If established by petition, all that is required of petitioners by way of expense is, first, to pay the county clerk his fees for reading and filing the petition, recording orders and making copies, and, on order of court, to pay into the county treasury the damages assessed, as a condition precedent to opening the road. No other charges can be imposed upon them.—*Id.*
3. *County courts — County roads — Decision of court touching, who may appeal from.*—The petitioners for establishing a new county road have no such interest in the matter as to authorize making them parties to an appeal or writ of error from the decision of the County Court touching the same, and liable to judgments in the appellate court. Only those whose private rights are affected—whose property is taken—have the power of appeal.—*Id.*
4. *County Court — Public roads — Seizure of private property for — Act of March 10, 1849 — Proof as to effort to make bargain.*—The 13th section of the law "about roads in St. Louis county" (Sess. Acts 1849, p. 593), in effect authorized the seizure of material belonging to individuals, for road purposes, only "when no private bargain could be made on fair terms." Under this law the County Court could not authorize a contractor for building a public road to divest the owner of his property for such purpose, when the proof before it failed to show any attempt to make a bargain with the owner or the offer of any compensation for the material.—*Lind v. Clemens*, 540.

See BOUNTIES, 1. CLARK COUNTY, 1. RAILROADS, 1, 2.

COURT, MACON COMMON PLEAS.

1. *Act reorganizing Macon Court of Common Pleas—Misdemeanor—Felony—Jurisdiction — Construction of statute.*—By the third section of the act organizing the Macon Court of Common Pleas (Sess. Acts 1868, p. 275), that court is prohibited from usurping the powers of the Circuit Court, which has exclusive and original jurisdiction over felonies; and when, upon examination, it is disclosed that the offense is a felony instead of a misdemeanor, it is the duty of the Common Pleas Court to certify that fact to the Circuit Court. But it has jurisdiction to proceed by complaint or information in cases of misdemeanor.—*Richardson v. Vrooman*, 440.

COURT, PROBATE.

See ADMINISTRATION. PRACTICE, CIVIL, 4.

COURT, SUPREME.

1. *Supreme Court, jurisdiction of—Not original touching litigation of private rights.*—It was never intended that this court should exercise original jurisdiction in matters of general litigation, or in contests respecting mere private rights.—*Vail v. Dinning*, 210.
2. *Supreme Court, jurisdiction of, generally appellate—Habeas corpus, etc., prerogative writs, variant from ordinary process.*—This court was designed to be strictly appellate in its character, duties, and functions, with certain marked and definite exceptions, such as cases of *habeas corpus*, *mandamus*,

COURT, SUPREME—(Continued.)

quo warranto, prohibition, etc. These are high prerogative writs, emanating from this court by direct application and by the authority of the sovereign power of the State. They are only issued when applied for in a proper case, and are wholly variant from that process of summons or notice by which one party brings an adverse party into court to determine a private right or to settle a matter of ordinary litigation.—*Id.*

3. *Circuit judge, contest for office of—Statute concerning, unconstitutional.*—Section 80, chapter 2, Gen. Stat. 1865, authorizing the contestor of the office of circuit judge to bring the issue originally before the Supreme Court by petition, without appeal or writ of error, invests it with a jurisdiction not authorized, but prohibited, by the constitution.—*Id.*
4. *Circuit judge, contest for office of—Does not warrant remedial writ.*—The contest for the office of circuit judge concerns a civil right, to be decided on the facts and issues, and does not call forth the extraordinary remedial writs of this court.—*Id.*
5. *Circuit judge, contest for office of—May be settled in lower courts.*—The law, as it now exists, affords an ample and complete remedy where the issues between parties contesting the office of circuit judge can be tried, and if the result is not satisfactory, an appeal will lie to this court; and the Legislature may also prescribe new and additional means for determining such contests. But this court can not assume jurisdiction, nor hear and determine cases, except on appeal or on writ issuing from this court.—*Id.*

See DECISIONS OF SUPREME COURT.

COURT, U. S.

See CRIMES AND PUNISHMENTS, 4.

COVENANTS.

See CONVEYANCES. DOWER, 3.

CRIMES AND PUNISHMENTS.

1. *Crimes and punishments—Counterfeiting U. S. treasury notes, indictable under State or United States courts.*—The passing, with intent to defraud, of a United States treasury note is an offense as well against the State as the United States; and although Congress might, perhaps, by appropriate legislation, render the jurisdiction of the national courts exclusive, still, as it does not appear to have done so, the jurisdiction of the State courts is not suspended. An indictment for such offense is not to be held bad, and the judgment upon it void, for the reason that an indictment would lie, under the laws of the United States, before the national courts, for the same acts as an offense against the United States.—*In re Truman*, 181.
2. *Crimes and punishments—Counterfeiting money obligations indictable under State statute—Construction of statute.*—The Legislature intended, by sections 16 and 21, ch. 202, Gen. Stat. 1865, to make the counterfeiting or passing of counterfeit money obligations, of every class and description, forgery in some of its statutory degrees; and an indictment for passing, with intent to defraud, a United States treasury note, as being an instrument or writing purporting to create a moneyed obligation, may be framed upon section 21 of the statute, setting out therein an offense within the jurisdiction of the State court.—*Id.*

CRIMES AND PUNISHMENTS—(Continued.)

3. *Crimes and punishments — Counterfeiting U. S. treasury notes indictable at common law.*—A counterfeit United States treasury note is a false token, and *semble*, that the fraudulent passing of it as genuine, knowing it to be false, constitutes an indictable cheat at common law. If so, State courts have jurisdiction on that ground, and the jurisdiction is not affected by the fact that the indictment may have been inartificially drawn, erroneously concluding against the statute, or may have been otherwise variously defective and subject to demurrer.—(Per CURRIER, J.)—*Id.*
4. *Crimes and punishments — Counterfeiting U. S. treasury notes — Indictment for not inquired into in habeas corpus proceedings.*—The regularity of an indictment in a State court for passing, with intent to defraud, a United States treasury note, and the rightfulness of the judgment rendered thereon, can not be investigated in a *habeas corpus* proceeding. That can be done alone through proceedings operating directly upon the judgment itself.—*Id.*
5. *Crimes and punishments — Habeas corpus — Prisoner detained under final judgment — Regularity of proceedings not inquirable into.*—Where, in proceedings on writ of *habeas corpus*, under section 33, ch. 155, Gen. Stat. 1865, it appears that the prisoner is detained “by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction,” no inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. (11 Mo. 661.)—*Id.*
6. *Crimes and punishments — Counterfeiting United States treasury notes not indictable at common law.*—A prisoner can not be indicted and proceeded against for passing, with intent to defraud, a United States treasury note, as for a common-law offense.—(Per Curiam.)—*Id.*
7. *Crimes and punishments — Offense consisting of different grades — Instructions limiting verdict to one grade.*—It is the established doctrine in this State that upon the trial of a person indicted for an offense consisting of different grades, the court may, by suitable instructions, if the evidence warrants it, direct the jury that the case, as made out by the evidence, belongs to one of the specified grades, and that, if the evidence is believed, they must find their verdict accordingly.—*State v. Joeckel*, 234.
8. *Crimes and punishments — Sentences at different terms of court upon the same person, effect of.*—Section 9, chapter 207, Gen. Stat. 1865, concerning terms of imprisonment in case of a criminal convicted of more than one offense, applies only where he is convicted of two or more offenses at the same term; and both convictions, under that provision, must take place before the sentence is pronounced in either case. And where a prisoner was sentenced, at the March term, 1866, of the St. Louis Criminal Court, to imprisonment for two years, for grand larceny, and at the May term of the same court he was again convicted and sentenced on another indictment for grand larceny for a period of three years, he will be entitled to his discharge at the expiration of three years.—*Ex parte Meyers*, 279.
9. *Criminal law — Courts have no common-law jurisdiction — Separate sentences, how pronounced.*—The courts in this State have no common-law jurisdiction in felonies. The powers that they exercise are such as are conferred by statute only; and separate sentences can only be passed upon the prisoner in the cause in the manner provided by statute.—*Id.*

CRIMES AND PUNISHMENTS—(Continued.)

10. *Crimes and punishments—Imprisonment commences with day of sentence—Criminal can not afterward be tried till expiration of term.*—As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment. Then, in legal contemplation, he is in custody different from that of the Criminal Court, and can not again be put upon trial till he has served out the term of imprisonment assessed against him.—*Id.*
See CONTRACTS, 2.

D

DAMAGES.

1. *Damages—Iron Mountain railroad—Special act of March 3, 1869.*—Section 2 of the special act of March 3, 1869, authorizing compensation to persons injured on the Iron Mountain railroad, did not limit the claim to party injured personally, but his administrator would be entitled under it to receive payment of the amount after his death. Section 2 was intended to guard against a sale of the claim, and nothing more.—*Hickey v. Dallmeyer*, 237.
2. *Railroad—Damages—Construction of statute—Actual collision required under.*—Section 43, chapter 63, Gen. Stat. 1865, contemplated a direct or actual collision between the train and the animal injured. In such case the company should be responsible for the penalty given by the statute; otherwise, not. The act was intended not only for the benefit and protection of owners of stock, but also as a public regulation for the safety of passengers and the traveling public, who are exposed to danger and peril in case of collision.—*Lafferty v. Hannibal & St. Joseph R.R. Co.*, 291.
3. *Damages—Setting fire to prairie—Premises left unclosed by—Measure of damages.*—In an action under the statute (Gen. Stat. 1865, ch. 81, p. 386) for damages to plaintiff's premises, caused by the willful firing by defendant of a prairie, the court erred in telling the jury to find for the plaintiff, among other things, "the value of the premises thrown out for one season." Plaintiff can charge defendant only for such damages as, by reasonable endeavors and expense, he could not prevent. In such case the rule for assessing damages would be the value of his rails lost and destroyed by the fire, and the loss of the use of the land during the time that was reasonably necessary to procure other rails and rebuild the fence. If he could have rebuilt the fence in time to secure a crop for that year, he could not hold defendant liable for the failure of crop. Whether he was guilty of negligence, or could have restored the fence within any given time by the use of reasonable means, was exclusively for the consideration of the jury.—*Waters v. Brown*, 302.
4. *Damages, recovery of—Diligence used in avoiding—Measure of damages.*—It is now well settled that one who is injured by another has no right to suffer damages to accumulate which it is in his power to prevent. He can not recover damages for injuries which by reasonable exertion he might avoid.—*State ex rel. Rice v. Powell*, 436.
5. *Damages—Corporations—City of St. Louis—Hospital—Non-paying patient.*—The city of St. Louis is not liable in damages to a non-paying patient at the City Hospital for injuries resulting from the negligence and

DAMAGES—(Continued.)

misfeasance of the officers and servants of that institution.—*Murtaugh v. City of St. Louis*, 479.

6. *Damages—Corporations—Negligence—Charity cases.*—Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties. But where the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the consequence of such acts or omissions on the part of officers and servants.—*Id.*

See **LANDLORD AND TENANT**, 5. **PRACTICE, CIVIL—PLEADING**, 18. **ST. CHARLES, CITY OF**, 1, 2.

DECISIONS OF SUPREME COURT.

1. *Stare decisis.*—Where the law has been settled for many years, and has become a rule of property, and titles have been vested on the strength of it, the error of the law would have to be most palpable to justify this court in overruling previous decisions.—*Reed v. Ownby*, 204.

DESCRIPTION.

See **CONVEYANCES. LAND AND LAND TITLES.**

DIVORCE.

1. *Divorces—Legislature has no power to grant.*—The doctrine that the Legislature of this State has no power to grant divorces dissolving the matrimonial connection, has been too long and well established, by repeated adjudications, to warrant its disturbance.—*Bryson v. Bryson*, 232.

DOWER.

1. *Dower—Election, right of—Notice of—Construction of statute.*—A failure on the part of the County Court to give notice to the widow apprising her of her right to elect her dower, as provided by section 9, p. 670, R. C. 1855 (Gen. Stat. 1865, ch. 130, § 9), will not have the effect of prolonging the time within which she must make her election. (*Price v. Woodford*, 43 Mo. 247, affirmed.)—*Ewing v. Ewing*, 23.
2. *Partition, sale in—Dower, assignment of—Sheriff's return, construction of.*—Suit was brought by the heirs of David L. Caldwell for the partition of certain land, in which dower had been assigned to his widow, Margaret Caldwell. The petition set forth that the petitioners were the owners of certain property, describing its boundaries. The court ordered absolute sale of the premises. They were accordingly advertised and sold; and the sheriff's deed, after reciting the order, advertisement, sale, etc., conveyed to the purchasers "all the right, title, claim, and interest of said petitioners in said petition mentioned, in and to said described tract of land so sold as aforesaid," etc. But the sheriff, in his return of the sale, declared that all the land was sold "except so much of the same as was heretofore assigned to Margaret Caldwell, widow of said David L. Caldwell, as her dower interest in said tract." *Held*, that the return of the sheriff, taken in connection with his deed and the other proceedings in partition, should be construed to mean: "except such interest in the same as was heretofore assigned," etc., "as her dower interest in the tract," and that the portion of land assigned as dower was not thereby expressly reserved to the widow.—*Caldwell v. Layton*, 220.

DOWER—(Continued.)

3. *Dower — Eviction — Covenant of seizin — Suit on.*—The satisfaction of a judgment in proceedings to enforce the assignment of dower in certain land, held by the grantee under a covenant of seizin, is equivalent to an eviction for the purposes of a suit by him against the grantee on the covenant.—*Magwire v. Riggin*, 512.
4. *Dower, prior to admeasurement, not subject of grant or assignment.*—A dowress, until her dower is set off, has no property in the land, which is the subject of grant or assignment.—*Id.*
5. *Dower — Inchoate right of — Not a "contingent demand" under bankrupt act of 1841.*—A demand against a bankrupt by his grantee or assignee, upon a covenant of seizin in the conveyance, founded upon a possible claim for dower in the land conveyed, is not such a "contingent demand" as could have been exhibited against the estate of a bankrupt, under the act of 1841 (Bankrupt law of 1841, § 5), and is not barred by discharge of the bankrupt for non-presentment prior thereto.—*Id.*

E

EJECTMENT.

1. *Ejectment — Tenant not a party to, not affected by.*—No tenant who was in possession anterior to the commencement of an ejectment suit can be dispossessed upon a judgment to which he was no party. (*Garrison v. Savignac*, 25 Mo. 53.)—*Goerges v. Hufschmidt*, 179.
2. *Ejectment — Description — Deed — Patent ambiguity, how cured.*—Suit in ejectment was brought for "the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen," of Randolph county, embracing an area of forty acres. The only designation in the deed on which the suit was founded which would include this tract was "the southwest quarter of section eleven." A quarter-section contained four forty-acre tracts. *Held*, that there being nothing in the deed to show to which forty it applied, the ambiguity in the description was patent, and could not be removed by extrinsic evidence. The title to the tract should be perfected by an action to reform the deed.—*Campbell v. Johnson*, 247.
3. *Ejectment, suit in — Receipt of purchase money — Estoppel.*—Where A. alleged that B. had not conveyed to him a certain tract of land, and in pursuance of such allegation commenced a suit for the purchase money, as for a failure of consideration; and B., relying upon the assertion of A., paid him back the money, and took a receipt therefor: *held*, that A. thereby caused B. to change his condition to his own detriment, and would be estopped from afterward suing B. in ejectment for the land.—*Id.*
4. *Ejectment — Suit may be brought by an insane person in his own name.*—An ejectment suit in this State may proceed in the name of plaintiff, without the intervention of a guardian, although it appear that he is insane.—*Allen v. Ranson*, 263.
5. *Ejectment — Mortgagor — Life interest of, no bar to suit.*—Where suit in ejectment is brought against a mortgagor who has possession and a life estate in the property, he can not retain his possession by showing that, when his curtesy ceases, the heirs of his deceased wife may be entitled to it.—*Id.*

EJECTMENT—(Continued.)

6. *Ejectment—Party in possession—Heirs need not be made party.*—In a suit by ejectment against a party who has a possessory title and life interest in the property, it is improper to make his heirs parties defendant.—*Id.*

See CONVEYANCES, 7. LANDLORD AND TENANT, 7.

ELECTIONS.

1. *Quo warranto—Pleadings in—Allegations of, should be denied—Elections—Title to office derived from election, not commission—Sheriff of Ralls county.*—Where an information in the nature of a *quo warranto* charged that defendant was holding and exercising the office of sheriff by virtue of the election of 1868, and in consequence of a certificate wrongfully issued by the clerk of the County Court, upon which a commission issued; an answer that defendant was duly elected in 1866, and that no successor had been qualified, was bad, for duplicity, and might be construed to mean that he was holding under either election, for the reason that no person had succeeded him in office. The allegation in the petition should have been denied. A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is an unlawful holding, and he may be ousted at the instance of the State, notwithstanding his commission.—State ex rel. Attorney-General v. Steers, 223.
2. *Elections—Officer can not hold by unlawfully detaining commission of his successor.*—Although by force of existing law an officer holds until his successor is elected and qualified, yet if, by unlawfully detaining his certificate and commission, he prevents the person legally entitled thereto from qualifying, he will not be allowed to set this up in defense, and reap a reward from his own wrong.—*Id.*
3. *Elections—Legality of votes determined by intention of voters—Defects in certificate supplied, how.*—In determining the legality of votes, a literal compliance with prescribed forms is not required in any case if the spirit of the law is not violated; and the governing principle in all cases is clearly to ascertain the intention of voters. If a defect exists in the certificate of election, that may be supplied at any time by the judges and clerks, whose duty it is to make the same before the vote is counted.—*Id.*
4. *Elections, act concerning—Duties under simply ministerial.*—Under section 25 of the act touching elections (Gen. Stat. 1865, ch. 2, p. 63), no power is given to adjudge whether votes are legal or illegal, but the simple ministerial duty to cast up and award the certificate to the person having the highest number of votes. To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims. To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties without notice or opportunity to be heard. The exercise of such a power is subversive of the rights of the citizen, and fatal to the elective franchise.—*Id.*
5. *Elections—Tribunal provided by law for determining validity of votes.*—The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proof.—*Id.*

ELECTIONS—(Continued.)

6. State ex rel. Attorney-General v. Steers, *ante*, p. 223, affirmed.—State ex rel. Attorney-General v. Bishop, 229.
7. *Elections—Judge of Buchanan Common Pleas Court—Certificate of election—Duty of County Court in granting.*—In an action of *mandamus* contesting the office of judge of Buchanan Court of Common Pleas, under the act of February 3, 1853 (Sess. Acts 1853, p. 78), where the evidence showed that there was but one candidate for the office, or the certificate of the clerk showed that a candidate had received a majority of the votes and was elected at a regular election, and without contest, the functions of the County Court were simply ministerial, and nothing remained for them but to issue the commission. They were invested with no discretion, and had no judicial functions to perform, the County Court being an inferior tribunal. And, under the constitution and laws of this State, where, in such case, it refused to issue the commission, this court has supervisory power, and may compel it to act. The words "or decided by said County Court to be entitled to said office," as employed in that act, have reference to a case where a contest has been had, or where two persons have received the same number of votes, and it becomes necessary to determine which shall hold and occupy the office.—State ex rel. Ensworth v. Albin, 346.
8. *Election—Common Pleas Court of Buchanan county—Mandamus—Prior registration.*—An election held for the office of judge of Buchanan Court of Common Pleas, under the act of February 3, 1853 (Sess. Acts 1853, p. 78), should have been preceded by a registration of voters, otherwise the election would be invalid; and in case of proceedings for *mandamus* to compel the County Court of Buchanan county to issue the commission of judge to relator, the writ will be denied unless the petition show such prior registration.—*Id.*
9. *Elections—Registering officers—Duties and powers not fully judicial.*—The officers of registration, under the act of 1865 (Gen. Stat. 1865, App. p. 904), were neither judges nor judicial officers in a legal sense. Their duties were partly ministerial and partly judicial. Although sections 9 and 20 of that act devolved on them extensive powers and required an exercise of judgment, they were not thereby to be considered judicial officers to the full extent.—Pike v. Megoun, 491.
10. *Elections—Registering officers—Liability of, prior to the act of 1865—Construction of that act.*—Prior to the enactment of any registration law the judges of election exercised essentially the same power in determining the qualification of a voter as the registering officers now exercise under the present system; yet all the cases hold that an action may be maintained against a judge of an election where he refuses, when acting in that capacity, to permit a qualified voter to exercise the right of suffrage; but as the judge of the election had to exercise his discretion, and acted *quasi* judicially, it would be necessary to allege and prove that such refusal was knowingly wrongful, malicious, or corrupt. By the act of 1868 (Sess. Acts 1868, § 23), the Legislature seems to have placed the same construction upon the act of 1865, touching the character of the registering officers.—*Id.*
11. *Elections—Registration act of 1865—Registration officers—Liability for refusing to receive votes.*—Under the law as it stood in 1866 (Gen. Stat. 1865, p. 904), the registering officers were not responsible for damages for refusing

ELECTIONS—(Continued.)

to register a person, however erroneous that refusal might have been, if it was produced merely by a mistake in judgment. But if the refusal was corrupt or actuated by malice, or to gratify personal spite, they would not be protected, but would be liable to an action by the person injured.—*Id.*

EMINENT DOMAIN.

1. *Eminent domain—Private property taken for public use—Law authorizing the taking must be strictly complied with.*—Whenever, in pursuance of any law, the property of an individual is to be divested against his will, there must be a strict compliance with all the provisions of the law authorizing such a proceeding.—*Lind v. Clemens*, 540.

EQUITY.

1. *Bill of exchange—Equity—Debt, assignment of—Evidence.*—A bill of exchange drawn by a creditor upon his debtor does not of itself operate as an assignment in equity of the debt, even where negotiated for a good consideration—although it is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawers, will vest in the holder an exclusive claim to the indebtedness.—*Bank of Commerce v. Bogy*, 13.
2. *Bill of exchange—Equity—Debt, assignment of—Intention of parties.*—Anything that shows an intention on the one side to make a present irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration; and when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it—especially if advanced at the time, with no circumstances indicating any remaining interest in the drawer—the order should be treated as evidence of an equitable assignment.—*Id.*
3. *Equity—Conveyances, fraudulent—Secret trusts.*—The law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands.—*Waddingham's Executors v. Loker*, 132.
4. *Equity—Voluntary trusts—Creditors—Agency.*—In a suit to subject certain stocks held by the widow and children of A. to the payment of his obligations, the mere fact that at his solicitation B. had purchased and held the same for the benefit of A.'s family, and that, as agent for B., A. had examined the books of the company and looked after the general management of the stocks, and, in his capacity as agent, had deposited dividends arising from the stocks, will not make such stocks liable for his debts, if it further appears that the stocks were not procured with his money or credit, and that he had no ownership or control of it except as agent of B.—*Id.*
5. *Equity—Fraud, what circumstances sufficient to establish—Evidence.*—In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud.—*Id.*

EQUITY—(Continued.)

6. *Equity — Co-sureties — Contribution — Judgment liens — Subrogation.*— Judgment was recovered against a number of co-sureties, who, subsequently thereto, sold sundry lands owned by them respectively while the same were subject to the lien of the judgment. The purchaser of one parcel, to prevent its sale under the judgment, paid the amount due thereon, and afterward brought suit in equity, praying that the land disposed of by the co-sureties, while subject to the same lien, might be subjected to a ratable proportion of the debt paid by him. *Held*, that while at law plaintiff's payment of the amount of the judgment operated as an extinguishment of the lien, yet equity, in furtherance of justice, would subrogate plaintiff to the rights of his grantor, and charge the lands bound by the lien in the hands of the other sureties or their grantees who purchased with notice. And the payment of the debt by plaintiff operated in equity as an immediate assignment to him of all the securities held by the judgment creditor. In such case it was the duty of the latter to make the transfer *instantly*.—*Furnold v. The Bank of the State of Missouri*, 336.
7. *Practice, Civil—Pleadings — "Plain and concise statement of facts," what is meant by.*—The "plain and concise statement of facts" required by the statute does not refer so much to the style of the pleader—to his command of terse and simple English—as to the attempt sometimes made to give a long and prolix history of the transaction upon which the suit is based, and encumber the pleadings with a number of impertinent allegations.—*McGlothlin, Adm'r of Moore, v. Hemery*, 350.
8. *Administrator—Note secured by deed of trust—Sale of land under—Bill in equity to redeem—Usury—Tender.*—Where the amount due on a note secured by a deed of trust on real estate is tendered by the administrator of the original maker, and is refused, he may immediately afterward file his petition to redeem the land; and if it be sold under the deed after tender, he may still obtain an order to set aside the sale and redeem the property; and if he needs the money to be derived from an administration sale of the land in order to pay the debts of the estate, he is a proper plaintiff in a bill for cancellation of the sale under the trust deed. If the amount called for by the trust note is in part usurious, the administrator, under section 4, chapter 89, Gen. Stat. 1865, may refuse to pay the usurious portion of it, and need only make tender of the balance.—*Id.*
9. *Practice, Civil—Pleading—Bill in equity—Multifariousness.*—Multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action. Distinct facts forming a series of transactions tending to a common end, or all necessary to plaintiff's equity, do not constitute multifariousness, nor does redundant or irrelevant matter that may be stricken out on motion, under section 20, chapter 165, Gen. Stat. 1865.—*Id.*
10. *Practice, Civil—Bill in equity—Prayer for relief.*—In a bill in equity, if the petitioner make a case which will entitle him to some relief in the power of the court to grant, although he may mistake as to the specific relief, he will not, in consequence, be turned out of court; much less, if he has one good specific request and a general prayer. All that portion of the prayer not warranted by the petition is a nullity, and should be treated as surplusage.—*Id.*

EQUITY—(Continued.)

11. *Contracts—Equity—Deed of trust, reformation of—Usury.*—In an action by the grantee to reform a deed of trust given to secure the payment of a note, where the defense of usury is set up and established in evidence, plaintiff must produce his note and rebate the usurious portion thereof before he can obtain the redress sought. Defendant will not be compelled to resort to an action enjoining the sale of the property under the deed in order to maintain his rights.—*Corby v. Bean*, 379.
12. *Contract—Sale—Equity—Failure of consideration—Fraudulent concealment—Repudiation—Defenses to action by vendor for purchase money.*—In general, when the title of a grantor in a deed fails, and the defense in a suit for the purchase money is that the purchaser gets nothing by his deed; or in a sale of parcels of land in gross, where the title to a portion fails, and the purchaser seeks to avoid the payment of a part of the purchase money—in either case the purchaser may rescind the contract by conveying or offering to convey back all the title he has received; in which case he may recover what has been paid, and refuse to pay what is unpaid. If he chooses to affirm the contract, he can recover but nominal damages for the breach of the covenant of seizin, unless actually evicted; the reason being that he has suffered as yet no actual damage, and that his possession may ripen into title. But in case of fraudulent concealment or misrepresentation as to some specific material fact affecting the value of the property sold—the purchaser trusting to these representations of the seller—he is not bound, upon discovery of the fraud, to repudiate the contract and give back the possession. He may do so, or he may stand by his purchase, and sue for damages; or if the purchase money is not paid, he may reduce it by the amount of the damages to which he is entitled.—*Owens v. Rector*, 389.
13. *Practice, Civil—Action for deceit—Intention—Instructions—Jury.*—In general, if a purchaser would hold on to the property purchased, and look to his vendor for damages for deceit, there being no warranty, he must, if sued for the purchase money, satisfy the jury that the deception was intentional. But the question of deception is one for the jury, and not the court, to decide. If there was evidence tending to show that the situation of the property was misrepresented, and that the defendant, in his purchase, acted upon those misrepresentations, and not upon his own judgment, the question of knowledge and intention on the part of the seller becomes a material one, and must be left to the jury; and if the court took the case from the jury because in its opinion such knowledge was not proved, it committed an error.—*Id.*
14. *Equity—Agent—Purchase of property of principal by, forbidden.*—An agent can not be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation.—*Grumley v. Webb*, 444.
15. *Equity—Agent, while in fiduciary capacity, can not interfere with title to the trust property.*—An agent who, for a certain remuneration, undertook to collect the rents and exercise control over the property of his principal while the latter was absent and relied entirely on his discretion, judgment, and

EQUITY—(Continued.)

integrity, had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. By purchasing the property under such circumstances, he made himself liable as a trustee in relation thereto, for the benefit of his principal.—*Id.*

16. *Equity—Sale—Purchaser—False representations by—Constructive trusts.*—Where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain—as, by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtained it at a sacrifice—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (*McNew v. Booth*, 42 Mo. 189.)—*Id.*
17. *Equity—Leasehold estate—Trustee—Renewal of lease in name of—Profits, to whom accounted for.*—Where a trustee in charge of a leasehold estate obtained a renewal of the lease of his *cestui que trust* in his own name, before the lease had expired, and the possession and title which he had got by reason of his being agent or trustee superinduced the execution of the lease to him, he will be obliged to assign it to the *cestui que trust*, and account for the profits.—*Id.*
18. *Equity—Lease—Renewal of by trustee in his own name—New lease held in trust for person entitled to original lease.*—A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon a refusal of the lessor to grant a new lease to the *cestui que trust*, will be held in trust for the person entitled to the old lease, on the ground of public policy, in order to prevent persons in such situations from acting so as to take a benefit for themselves.—*Id.*
19. *Chancery—Fraudulent conveyances.*—It is necessary to exhaust all legal remedies before applying for the assistance of a court of chancery. In exhausting the legal remedies a lien may be created upon property sought to be charged, but a lien is not necessary in order to obtain the assistance of a court of chancery. A lien is the incident, but not the object, of the proceedings. It is generally necessary to show the issuance of an execution and a return of *nulla bona*, but it may be dispensed with where it is shown that the debtor was insolvent.—*Merry v. Fremon*, 518.
20. *Equity—Fraudulent conveyances—Consideration—Undue influence.*—A conveyance obtained without sufficient consideration by a person resorting to undue influences, or practicing fraud or deception, will generally be set aside. Fraud and mistake vitiate and avoid a conveyance without regard to the sources whence they originated, or the effect which they produce. But in order to avoid a grant on the ground of undue influence, it must be shown that the influence existed and was exercised for an undue and disadvantageous purpose. Where influence is shown to have existed, or to have been unduly exercised, or confidence to have been reposed and abused, its source will be immaterial, a man being as much bound to act for the best interests of another who has trusted him as a friend as if he had been appointed a trustee or agent.—*Turner v. Turner*, 535.

See ADMINISTRATION, 4. CONVEYANCES, 4, 5, 7. CORPORATIONS, 4, 5.

ESTOPPEL.

See EJECTMENT, 3.

EVIDENCE.

1. *Bill of Exchange — Equity — Debt, assignment of — Evidence.*—A bill of exchange drawn by a creditor upon his debtor, does not of itself operate as an assignment in equity of the debt, even where negotiated for a good consideration—although it is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawers, will vest in the holder an exclusive claim to the indebtedness.—*Bank of Commerce v. Bogy*, 13.
2. *Husband and wife — Debts of husband contracted during coverture — Property of wife not derived from her husband — Presumptions.*—The law authorizes no general presumption that the debts of the husband contracted during marriage were for the joint benefit of the husband and wife, and, if it did, it could not apply to the property of the wife held before coverture. Nothing is to be presumed against the separate estate of the wife, not derived from the husband, that does not arise from her deed.—*Kinner v. Walsh*, 65.
3. *Contracts — Sales — Custom merchant, how established; when binding — Evidence.*—A custom, to be good, must be general, uniform, and notorious, and, to be binding on the parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed; and evidence which does not tend to establish any open, uniform, and notorious rule, but simply consists of the declarations of witnesses as to what their individual opinions are, and the obligations they should have deemed resting upon them in certain circumstances, is illegal, and should be excluded.—*Southwestern Freight and Cotton Press Company v. Stanard*, 71.
4. *Contracts — Established custom, evidence of, for what purpose admissible; force of.*—Where a contract is made as to a matter about which there is a well-established custom, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all the particulars which are not expressed in the contract. But evidence of custom is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law.—*Id.*
5. *Evidence — Surveys, unofficial — Competency.*—A plat of land made by a surveyor, although not a record nor official in its character, when accompanied by the testimony of the surveyor who made the survey, and who testifies to its correctness, may properly be exhibited to the jury as a part of such testimony, and the accuracy of the plat may properly be left to the jury. It is not necessary that one who makes surveys should be a county or government surveyor to enable him to testify to his surveys or the correctness of any plat of them.—*Minke v. Skinner*, 92.
6. *Evidence — Depositions — Admissibility.*—A paper, purporting to be a deposition, which does not show in what cause it was taken, or whether with or without notice, or who was present examining and cross-examining, and was not filed in any particular cause, has none of the elements of a deposition, and should be rejected if offered in evidence.—*Id.*
7. *Evidence — Bonds — Sureties — Admissions of principal.*—Admissions made before the execution of a bond by one who afterward executed it as principal, and which were not made in the progress of any business intrusted to him by the surety, and formed no part of the *res gestæ* of the subject matter of the suit, are not evidence against the surety on the bond, and should not be

EVIDENCE—(Continued.)

admitted in a suit on the bond against the surety. The statements made by the principal, at the time the bond was executed, in the presence of the other parties, and as a part of that transaction, stand on a different footing, as would any statement made by him in the progress of fulfilling the conditions of the bond.—*Cheltenham Fire-Brick Company v. Cook*, 29.

8. *Bond—Trust—Practice, Civil—Parties.*—Where a bond is executed for the payment of money to the obligee, part for his own use and part for the use of another, the obligee may sue in his own name, on his own behalf and as trustee for the other. A payment to the obligee, in accordance with the bond, of any money due to the *cestui que trust* would be a satisfaction of the demand, and the obligors in the bond could not be called upon to account again.—*Id.*
9. *Equity—Fraud, what circumstances sufficient to establish—Evidence.*—In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud.—*Waddingham's Executors v. Loker*, 132.
10. *Contracts, interpretation of—Determined from obvious intention, as derived from all parts.*—Mere verbal criticism should not be resorted to in interpreting contracts or legal proceedings. Courts should be governed by their obvious intention, as derived from all parts of the instrument or record.—*Caldwell v. Layton*, 220.
11. *Contracts—Sheriffs' sales—Parol testimony as to declarations of sheriff at time of, how shown.*—Parol testimony as to declarations of the sheriff at the time of a partition sale, in order to explain the meaning of his deed, is improper, because its introduction is an attempt, collaterally, to impeach the record. The sale could have been set aside for cause by a direct proceeding in the same court, and, in such case, parol testimony of anything that occurred at the sale would be admissible.—*Id.*
12. *Evidence—County records—Notice imparted by—Clerical error.*—Under section 41, p. 364, R. C. 1855 (Gen. Stat. 1865, ch. 109, § 25), notice of the contents of instruments is held to be imparted, after filing, only where the contents are correctly spread on the record, and not otherwise. The act was never designed to impose on the purchaser the burden of entering into a long and laborious search into the original papers to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests upon the party holding the title. If his duty is imperfectly performed, he must suffer the consequences, and not an innocent purchaser.—*Terrell v. Andrew County*, 309.
13. *Evidence—Receipt—General and particular terms, how construed.*—A receipt given in full satisfaction of a certain judgment therein specified, and also of "all claims and demands," will not avail against another suit pending between the same parties, and not shown to have been intended by them to be included in the receipt. Language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.—*Grumley v. Webb*, 444.

EVIDENCE—(Continued.)

14. *Seal, what sufficient.*—Colored paper in the form of a seal, attached by mucilage to an instrument, is a sufficient sealing. (33 Mo. 35.)—Turner v. Field, 382.

See ADMINISTRATION, 4, 6. ATTACHMENT, 2. BILLS AND NOTES, 7, 8. CONVEYANCES, 1, 2, 3, 4, 8. CORPORATIONS, 2. LAND AND LAND TITLES, 3, 4. LIMITATIONS, 2. PRACTICE, CIVIL—ACTIONS, 8. PRACTICE, CIVIL—PLEADING, 18.

EXECUTIONS.

1. *Execution — Exemption — Construction of statute.*—Under the provisions of sections 9 and 11, of chapter 160, of the General Statutes, the head of a family is entitled to hold exempt from execution one hundred dollars' worth of household goods and furniture for the convenience and comfort of the family, and three hundred dollars' worth of other property to contribute to their maintenance and support.—State, to use of Reagan, v. Romer, 99.
2. *Execution — Exemption — Officer making levy, duty of.*—It is the duty of the officer having the writ or process in his hands, to notify the debtor of his rights of exemption from levy.—*Id.*
3. *Practice, Civil — Executions, stay of — Construction of statute.*—The sixty-seventh, sixty-eighth, and sixty-ninth sections of chapter 160, pp. 648-9, Gen. Stat. 1865, simply give a party the privilege, and enact the means, of taking steps in vacation to have the further proceedings on an execution stayed until he can be heard in court as to whether it should be set aside or quashed. The proceeding is not exclusive, and does not prevent the usual resort to a motion to set aside or quash at the return term in open court.—Parker v. Hannibal & St. Joseph Railroad Company, 415.
4. *Executions — Sales, when set aside — Inadequacy of consideration — Misunderstanding of parties.*—The mere fact that lands are sold under execution for an inadequate price would not of itself be sufficient ground to set aside the sale. But where the evidence showed that the property was sold for a price grossly inadequate, after the hour in the day when other sales were made and competition was free, and without the consent of defendant's counsel, the sale should be set aside on motion. To retain property sold for a grossly inadequate price, the vendee should be guilty of no misconduct, and should act with the most exact good faith.—*Id.*
5. Parker v. Hannibal & St. Joseph Railroad Company, *ante*, p. 415, affirmed.—Ruby v. Hannibal & St. Joseph Railroad Company, 442.

F

FRAUD.

1. *Notes — Fraud and deceit — Settlement should be repudiated before commencing proceedings on original claim.*—Defendant was sued for the services of a slave. He denied the indebtedness, but, to avoid a controversy, "squared off" by giving plaintiff a certain note on which sundry payments had been indorsed. Plaintiff took the note without examination, collected the money, and pocketed the proceeds. Because it turned out that the amount due on the note was less than plaintiff's claim, he could not treat the claim as unadjusted, and sue for the balance, on the plea of fraudulent misrepresentation by defendant concerning the amount remaining due on the note. Before

FRAUD—(Continued.).

commencing proceedings on his original claim, he should have tendered back the note received of defendant, and should have repudiated the settlement; or he might have prosecuted directly for the deceit, abandoning entirely his original cause of action. In that case he could retain the note, and recover, in addition, all he had suffered by the deception.—*Jarrett v. Morton*, 275.

See ADMINISTRATION, 9, 10, 11. EQUITY, 5, 12, 13. FRAUDULENT CONVEYANCES. PRACTICE, CIVIL—TRIALS, 7. TRADE-MARK, 7.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Statute concerning—Sale—Change of possession, what constitutes—Clerk—Vendee of vendee.*—Under section 10, ch. 67, R. C. 1855 (*vide* also, Gen. Stat. 1865, p. 440, § 10), the vendee must take the actual possession; and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the vendor, that the goods have changed hands, and that the title has passed out of the seller into the purchaser. (*Claffin v. Rosenberg*, 42 Mo. 439.) Otherwise, the sale will be presumed fraudulent and void; and this notwithstanding that the vendor remained in charge as clerk or agent of the vendee. And it is immaterial that the claimant of goods attached, purchased them of the vendee of defendant in the suit. The last vendee stands in no better condition than the intermediate purchaser unless he has taken and continued in the actual possession of the purchased goods.—*Lesem v. Herriford*, 323.
2. *Chancery—Fraudulent conveyances.*—It is necessary to exhaust all legal remedies before applying for the assistance of a court of chancery. In exhausting the legal remedies a lien may be created upon the property sought to be charged, but a lien is not necessary in order to obtain the assistance of a court of chancery. A lien is the incident, but not the object, of the proceedings. It is generally necessary to show the issuance of an execution and a return of *nulla bona*, but it may be dispensed with where it is shown that the debtor was insolvent.—*Merry v. Fremont*, 518.
2. *Probate Court—Fraudulent conveyances.*—The Probate Court has no power to set aside a conveyance of deceased on the ground of fraud.—*Id.*
4. *Administrator—Fraudulent conveyances.*—A conveyance can not be impeached by the administrator of the grantor as being fraudulent on the part of the grantor.—*Id.*
5. *Administrator—Fraud—Parties.*—An administrator is not a proper party to a suit to set aside a conveyance of the deceased as being a fraudulent act of the deceased.—*Id.*
6. *Equity—Fraudulent conveyances—Consideration—Undue influence.*—A conveyance obtained without sufficient consideration by a person resorting to undue influences, or practicing fraud or deception, will generally be set aside. Fraud and mistake vitiate and avoid a conveyance without regard to the sources whence they originated, or the effect which they produce. But in order to avoid a grant on the ground of undue influence, it must be shown that the influence existed and was exercised for an undue and disadvantageous purpose. Where influence is shown to have existed, or to have been unduly exercised, or confidence to have been reposed and abused, its source will be immaterial, a man being as much bound to act for the best interests of

FRAUDULENT CONVEYANCES—(Continued.)

another who has trusted him as a friend as if he had been appointed a trustee or agent.—*Turner v. Turner*, 535.

See SALES, 10.

FRAUDS, STATUTE OF.

1. *Contracts—Sales—Statute of frauds—Right of property, what sufficient to pass.*—If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right does not attach to the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price.—*Southwestern Freight and Cotton Press Company v. Stanard*, 71.

G

GARNISHMENT.

1. *Garnishment—Indebtedness—Defense.*—The plaintiff, in a garnishment based upon an alleged indebtedness, proposes only to succeed to the rights of the garnishee's alleged creditor as to the indebtedness; and whatever would defeat the creditor in a suit in his favor to recover the alleged debt will also be fatal to a recovery in such garnishment.—*McDermott v. Donegan*, 85.

GERMAN INSURANCE COMPANY, THE.

See CORPORATIONS, 3.

GUARDIAN AND WARD.

1. *Guardian and ward—Donations, how generally treated.*—Gifts, grants or donations obtained by attorney from client, spiritual adviser from advisee, trustee from *cestui que trust*, parent from child, and guardian from ward, are watched by courts with the most scrutinizing jealousy, and generally held to be presumptively void.—*Garvin's Adm'r v. Williams*, 465.
2. *Wills—Guardian and ward—Will to guardian by ward—Presumptions of law concerning.*—In a suit to set aside a will, it appeared that the donee became the guardian of deceased while the latter was a mere child; that deceased always resided in his family; that he surrendered everything to his guardian's judgment, and reposed the most implicit confidence in him in every respect; that a day or two after becoming of age, and while residing in the house of his guardian, deceased effected a settlement with him, and on the day following made his will, disinheriting all his kindred and relations, and conveying all his property to the guardian; that about a month afterward, and while still under his care, he died: *held*, that the will was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it.—*Id.*

H

HABEAS CORPUS.

1. *Crimes and punishments—Counterfeiting U. S. treasury notes—Indictment for, not inquired into in habeas corpus proceedings.*—The regularity of an indictment in a State court for passing, with intent to defraud, a United States treasury note, and the rightfulness of the judgment rendered thereon, can not be investigated in a *habeas corpus* proceeding. That can be done alone

HABEAS CORPUS—(Continued.)

through proceedings operating directly upon the judgment itself.—In re Truman, 181.

2. *Crimes and punishments—Habeas corpus—Prisoner detained under final judgment—Regularity of proceedings not inquirable into.*—Where, in proceedings on writ of *habeas corpus*, under section 33, ch. 155, Gen. Stat, 1865, it appears that the prisoner is detained “by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction,” no inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. (11 Mo. 661.)—*Id.*

See COURT, SUPREME, 2. PRACTICE, CRIMINAL, 1.

HUSBAND AND WIFE.

1. *Husband and wife—Deed of trust of wife's separate property to secure debts of the husband—Liability of surplus in the hands of the trustee after sale for debts of the husband.*—Where a married woman, jointly with her husband, conveys her separate real estate by deed of trust to secure a certain debt of her husband, and the deed provided that if the property should be sold under the deed the proceeds should be applied to the payment of the debt, and the remainder, if any, should be paid to the parties of the first part—the husband and wife—or their legal representatives: *held*, that this remainder should be returned to the party of whose property it was the proceeds, and that by the provision of the deed it belongs to the wife alone.—Kinner v. Walsh, 65.
2. *Husband and wife—Deed of trust of separate real estate of wife to secure debts of the husband—Equity of redemption, to whom it descends—Surplus.*—Where a married woman, jointly with her husband, conveys her separate real estate to secure debts of her husband, and dies before sale under the deed, the equity of redemption descends to her heirs; and upon her death their right of property becomes complete, subject only to the trust deed and to the curtesy of the husband. That descent carries with it the right to any surplus arising from the sale of the property after paying the debt secured by the deed.—*Id.*
3. *Husband and wife—Debts of husband contracted during coverture—Property of wife not derived from her husband—Presumptions.*—The law authorizes no general presumption that the debts of the husband contracted during marriage were for the joint benefit of the husband and wife; and, if it did, it could not apply to the property of the wife held before coverture. Nothing is to be presumed against the separate estate of the wife, not derived from the husband, that does not arise from her deed.—*Id.*

See DIVORCE. DOWER.

I

INDORSEMENT.

See BILLS AND NOTES.

INFANTS.

1. *Contracts—Infants—What contracts void and what voidable.*—The contracts of infants for necessities, such as shelter, food, and clothing proper for their station, and such other means of support and education as may be

INFANTS—(Continued.)

requisite for them, are valid and obligatory. But, generally, their promises in any business transaction, though not absolutely void, are voidable by them. And the contract of partnership may be made by an infant for his own benefit, subject to his right to avoid it when he comes of age.—Kerr v. Bell, 120.

2. *Contracts—Rescission—Infants—Consideration.*—An infant vendor may recover back his property, either real or personal; but in such a case he must refund what he has received. There can be no such right of recovery so long as any part of the consideration is withheld.—*Id*

See CONVEYANCES, 19.

INJUNCTION.

See PRACTICE, CIVIL—ACTIONS, 5. REVENUE, 10. TRADE-MARK, 1, 7.

INSANE PERSON.

See EJECTMENT, 4.

INSTRUCTIONS.

See PRACTICE, CIVIL—TRIALS. PRACTICE, CRIMINAL, 4.

INSURANCE.

1. *Insurance companies—Act of March 10, 1869—Real estate securing stock of companies formed under, limited to Missouri.*—It was the intention of the act of March 10, 1869, concerning life insurance (Sess. Acts 1869, p. 32, § 19), that the security given by insurance companies to the superintendent of the insurance department, to enable them to do business, should be founded on unencumbered real estate situated in Missouri. This construction is borne out by sections 34 and 35, under which foreign insurance companies doing business in this State must obtain from the commissioners of their own States guarantees as to the solvency of the securities given by them.—*State ex rel. Missouri Mutual Life Insurance Company v. King*, 283.
2. *Insurance companies—Act of March 10, 1869—Information touching business of companies, failure to give—Penalty for.*—The *qui tam* action provided by section 43 of the act of March 10, 1869, for the incorporation of insurance companies, etc. (Sess. Acts 1869, p. 60), for violation of the act by such companies, is not exclusive. That section refers generally to all violations of the act. But when parties fail to comply with or violate section 13 of the act “to create an insurance department” (Sess. Acts 1869, p. 23), requiring insurance companies to give information to the State superintendent of insurance touching their business, they are liable to be proceeded against for misdemeanor, under that section.—*State v. Mathews*, 523.
3. *Insurance companies—Act of March 4, 1869—Title of statute—Constitution.*—Section 13 of the act entitled “An act to create an insurance department” (Sess. Acts, 1869, p. 23), in substance, required insurance companies, on demand, to give the State superintendent of insurance, information touching their business, and, for failure to furnish the same, made the party offending guilty of misdemeanor, and subject to fine and imprisonment. *Held*, that the said section was not in violation of section 32, art. IV, of the State constitution as relating to a subject not included in the title of the act. It was necessary, in order to carry out the act, to empower the superintendent to obtain such information; but the power would have been fruitless without the authority to enforce it.—*Id*.

INSURANCE—(Continued.)

4. *Insurance companies—Act of March 10, 1869—Title of—What companies embraced in.*—An act entitled "An act for the incorporation of insurance companies other than life insurance companies, and for the regulation of insurance business, other than life assurance business" (Sess. Acts 1869, p. 45), comprehends fire and marine insurance companies.—*Id.*
5. *Insurance companies—Act of March 4, 1869—U. S. constitution—Contracts—Impairing obligation of.*—A fire and marine insurance company was chartered prior to the passage of the act of March 4, 1869, "to create an insurance department." *Held*, that section 13 of that act requiring insurance companies, on demand, to furnish the State superintendent of insurance with information touching their business, was not in violation of the constitution of the United States, as impairing the obligation of the contract between the State and the company, arising from the charter. Corporations, like natural persons, are subject to those laws which the State may prescribe for the good government and regulation of the community, and the protection of the citizen. The power of the State to prescribe such laws is inherent in every sovereignty, and can not be surrendered even in the granting of a charter.—*Id.*

See ARBITRATION AND AWARD, 1, 2.

J

JUDGE, CIRCUIT

See OFFICERS, 4, 5, 6.

JUDGMENTS.

1. *Judgments in personam, where no property was attached, held invalid.*—A judgment merely in *personam* against a non-resident debtor founded on notice by publication, as provided by section 13, p. 1224, R. C. 1855, is void, and may be impeached collaterally. The publication gave the court no jurisdiction over his person. Plaintiff by attachment under such notice might secure jurisdiction over the specific property attached, but not over the person or any other property.—*Abbott v. Sheppard*, 273.

See ACCOUNT, STATED, 1. ADMINISTRATION, 7. EQUITY, 6. LANDLORD AND TENANT, 7. PRACTICE, CIVIL, 1, 2. PRACTICE, CIVIL—TRIALS, 7. REVENUE, 2, 4.

JURISDICTION.

See CRIMES AND PUNISHMENTS, 9. COURT, MACON COMMON PLEAS, 1. JUSTICES' COURTS, 2. SUPREME COURT, 1, 2.

JUSTICES' COURTS.

1. *Justices' courts—Exhibits filed—Lease—Instrument of writing.*—A lease in writing, duly signed, sealed, and delivered, is an instrument of writing within the meaning of the statute concerning the filing of such instruments, in actions founded thereon, in justices' courts (Gen. Stat. 1865, p. 201, § 13); and the circumstance that it provides for other things than the direct payment of money or property in no way affects its character as a written instrument within the meaning of said statute.—*Gillihan v. Wren*, 377.
2. *Justices' courts—Jurisdiction not lost by reason of failure of the instrument filed to show the amount demanded—Verbal statement.*—Although a lease

JUSTICES' COURTS—(Continued.)

filed as an instrument of writing, as the foundation of an action, before a justice of the peace, does not on its face show the amount demanded, that fact is not sufficient to deprive the justice's court of jurisdiction. In such case the defendant is entitled to the verbal statement provided for by section 12, p. 706, Gen. Stat. 1865.—*Id.*

3. *Practice, Civil—Tender of payment—Constable—Justice—Construction of statute.*—Where defendant, under section 19, chapter 180, Gen. Stat. 1865, made tender of the amount afterward recovered against him, exclusive of costs, to the constable, but by his directions paid the sum over to the justice, he complied with the spirit of the statute, and was not liable for costs of suit.—*Berrel v. Davis*, 407.

See PRACTICE, CIVIL—ACTIONS, 3.

L

LANDLORD AND TENANT.

1. *Landlord and tenant—Leases—Renewal, covenant of—Indefiniteness in, how may be cured by court of chancery.*—Leaving the amount of rent for the renewal term of a lease to be ascertained by what "responsible parties would agree to give for the use of the premises" fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease; and a court of chancery may in either case hear evidence and determine for itself the rentable market value of the premises where the appraisement fails. What "responsible parties will agree to give" for the use of the rentable business property is nothing more than its full or highest rentable value.—*Arnot v. Alexander*, 25.
2. *Landlord and tenant—Lease—Renewal, covenant of—Violation of, lessee has what remedy.*—Where by the covenant for renewal of a lease the lessee is entitled thereto, "provided that parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give," it is in every way reasonable and just that the lessee should elect his remedy, and either take damages at law or have a specific performance in equity.—*Id.*
3. *Landlord and tenant—Rent, demand of—Possession.*—Where a lot of ground was leased by a verbal lease, and the lessee took possession of and held only a part of the ground leased, and other parties afterward entered upon and occupied the remainder of the lot under other leases, and the lessor brought suit on the lease against all the occupants for the possession of the lots, for non-payment of rents, it was not sufficient to sustain his suit that the lease was made and the land held and the rent not paid; it was necessary that demand of the rent from the lessee should have been made before there could be a forfeiture. And as to the other persons who were on the rest of the land, it was necessary that they should have entered under the lessee, or after possession by the lessee, or that they illegally dispossessed him.—*Blackman v. Welsh*, 41.
4. *Landlord and tenant—Possession.*—The question of actual possession is a question of fact; what would constitute possession is a question of law.—*Id.*
5. *Landlord and tenant—Unlawful detainer—Appeal bond—Damages.*—The defendant, in an action before a justice of the peace for unlawful detainer,

LANDLORD AND TENANT—(Continued.)

appealed from a judgment rendered against him, and gave a bond conditioned that he should prosecute the appeal with effect and without delay, and afterward failed to prosecute the appeal, and the appeal was dismissed, but no judgment was rendered against him in the appellate court. Plaintiff then sued for damages on the bond, alleging a breach of the above condition, claiming rents and profits as damages. *Held*, that the condition above stated having been broken, the liability to a judgment for the penalty was complete; and that, if the plaintiff was deprived of the use of the property, or of his right to restitution by the appeal, the damage arising from such deprivation was the result of the appeal, and, the condition of the bond being broken, the obligee would be entitled to execution for such damages.—*Bernecker v. Miller*, 126.

6. *Landlord and tenant—Tender of payment of rent by ousted tenant, when sufficient to prevent forfeiture.*—Where a tenant, ousted by his landlord for non-payment of rent, afterward tenders the amount in arrear, and same is refused, and the tenant is still kept out of possession, such tender is sufficient to prevent a subsequent forfeiture for non-payment of rent after the time of making the tender. Under such circumstances no rent accrued for that period. (*Graham v. Carondelet*, 33 Mo. 262; *Holmes v. Carondelet*, 38 Mo. 551.)—*Holmes v. Guion*, 164.
7. *Landlord and tenant—Lease—Ejectment—Judgment by consent, effect of, in subsequent suit.*—Where a suit in ejectment was brought upon a lease, and judgment was rendered by consent for possession and damages, such judgment and consent did not destroy the lease, or plaintiff's right under it. The lease was not surrendered either in law or fact, nor was the lessee estopped from a subsequent suit under it.—*Id.*
8. *Ejectment—Tenant not a party to, not affected by.*—No tenant who was in possession anterior to the commencement of an ejectment suit can be disposed upon a judgment to which he was no party. (*Garrison v. Savignac*, 25 Mo. 53.)—*Goerges v. Hufschmidt*, 179.
9. *Forcible entry and detainer—Question of title not admissible.*—In an action of forcible entry and detainer, no question of title is admissible. All that devolves upon plaintiff in that proceeding is to show that he was lawfully possessed of the premises, and that defendant unlawfully entered into and detained the same.—*Id.*

LAND AND LAND TITLES.

1. *Land Titles—Conveyances—Description of property—Construction.*—Two tracts of land, conveyed to different grantees by the same grantor, lay upon opposite sides of a pond, through which a creek flowed at the time of making the deeds. Both of the deeds describing the separate tracts of land gave the boundary line dividing them as "the middle of the natural channel of the creek when the pond is exhausted." These deeds also reserved the right of keeping up the dam and the flow of water in the pond forever. The water in the pond was drawn off or exhausted about eighteen or nineteen years after the deeds were made. *Held*, that the phrase "the middle of the natural channel of the creek when the pond is exhausted" meant the position of the thread of the creek at the time when the pond was actually exhausted. If the phrase "when the pond is exhausted" had been left out, the deeds would have provided for a shifting boundary, changing with the gradual changes of the

LAND AND LAND TITLES—(Continued.)

- stream, until the owners, by the withdrawal of the pond, could take possession of the bed and confine the stream. That phrase only fixes the time when this uncertain boundary should become certain, and fixes it at the precise time when the parties should be enabled to take possession. (*Primm et al. v. Walker*, 38 Mo. 94, cited and affirmed.)—*Mincke v. Skinner*, 92.
2. *Evidence—Surveys, unofficial—Competency.*—A plat of land made by a surveyor, although not a record nor official in its character, when accompanied by the testimony of the surveyor who made the survey, and who testifies to its correctness, may properly be exhibited to the jury as a part of such testimony, and the accuracy of the plat may properly be left to the jury. It is not necessary that one who makes surveys should be a county or government surveyor to enable him to testify to his surveys or the correctness of any plat of them.—*Id.*
 3. *Land and land titles—Monuments, etc., when must prevail over courses and distances.*—Fixed and known monuments called for in a deed, and also points and lines expressly called for, which are fixed and well known, or are capable of being fixed with certainty, must prevail over courses and distances.—*Kronenberger v. Hoffner*, 185.
 4. *Land and land titles—Lines, how ascertained where there are no express calls.*—Where there are no express calls that determine a line with certainty, evidence *aliunde* is admissible to show where the line was actually run to which the deed refers, or to which it must have reference; and its location, so fixed by extrinsic evidence, will control the courses and distances named in the deed or in the survey. Field-notes and plats of the surveyor, with the calls for courses and distances, properly authenticated, can be shown, not to make a line, but as evidence of an existing line, and they must yield to other satisfactory evidence of its true location.—*Id.*
 5. *Stare decisis.*—Where the law has been settled for many years, and has become a rule of property, and titles have been vested on the strength of it, the error of the law would have to be most palpable to justify this court in overruling previous decisions.—*Reed v. Ownby*, 204.
 6. *Land and land titles—Description—Certainty of.*—It is not necessary that the description of land be contained in the body of a deed. It is sufficient if it refers, for identification, to some other instrument or document; or, if no reference be made, surveys, monuments, etc., must be ascertained, in order to locate the land. But the description must be contained in the instrument or its references, express or implied, with such certainty that the locality of the land can be ascertained from it.—*Nelson v. Brodback*, 596.
 7. *Land and land titles—Sheriff's deed—Presumptions of intentment.*—The same presumption of intentment can not be inferred from a sheriff's deed as from a direct conveyance from the grantor. In the latter case the ambiguity is the grantor's fault. He has voluntarily sold his property and received the proceeds; and everything should be construed more strongly against him than his grantees.—*Id.*
 8. *Land and land titles—Execution—Sheriff's deed—Advertisement.*—In a sheriff's deed the description of the land thereby conveyed was so imperfect that nothing could pass by that alone. But the deed further recited that the sheriff had given notice of the time and place of sale, and of the real estate to be sold, in the *St. Louis Daily Union*, etc., "a copy of which advertisement

LAND AND LAND TITLES—(Continued.)

is hereto annexed, and makes part of this deed." And in the granting part, the sheriff transferred to the purchaser the interests of defendant in the execution "in and to the above-described real estate." The copy of the advertisement was attached by a wafer, after his signature. *Held*, that the description in the deed in no way referring, either directly or indirectly, to the advertisement, was not modified or controlled by it; and that the advertisement could not be treated as a part of the description.—*Id.*

See **LANDLORD AND TENANT**, 8, 9. **PRACTICE, CIVIL—PLEADING**, 22.

LEASE.

See **EQUITY**, 16, 17, 18. **JUSTICES' COURTS**, 1. **LANDLORD AND TENANT**, 1, 2, 3, 4.

LEGISLATURE.

See **CONSTITUTION OF MISSOURI**, 2, 3. **CONTRACTS**, 20. **DIVORCE**, 1. **OFFICERS**, 8. **REVENUE**, 13. **ST. CHARLES COLLEGE**, 6, 7, 8. **STATUTE, CONSTRUCTION OF**.

LIEN.

See **EQUITY**, 6.

LIMITATIONS.

1. *Bills and notes—Statute of limitations—Indorsements of credit, effect upon.*—The time when the indorsement of a credit on a note was made is a fact to be settled by the jury, and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date, and the burden of proving the date to be false lies with the other party. But if the date does not purport to be made contemporaneously with the receipt of the money, it is inadmissible as a part of the *res gesta*.—Carter, Adm'r of English, v. Carter, 195.
2. *Bills and notes—Statute of limitations—Credits indorsed upon, when evidence of part payment.*—In an action by an administrator upon a note made to his intestate more than ten years before, the indorsement of a credit thereon by the intestate, nearly two years before the note expired by limitation, would be *prima facie* evidence that he had received part payment on the note. Such indorsement was clearly admissible, because against the interest of the deceased.—*Id.*

See **OFFICERS**, 9. **PRACTICE, CIVIL—PLEADING**, 22.

M**MANDAMUS.**

See **COURT, SUPREME**, 2. **ELECTIONS**, 8. **OFFICERS**, 7. **ST. CHARLES, CITY OF**, 1.

MEAT-SHOPS.

See **ST. LOUIS, CITY OF**, 10, 11.

MISTAKE.

1. *Practice, Civil—Actions—Trover—Mistake in boundary lines—Fence rails.*—A rail fence, built with the intention of dividing the lands of A. and B., was, by miscalculation, placed inside of B.'s boundary line. Suit being

MISTAKE—(*Continued.*)

brought for the value of the rails, the court properly held that if the proof showed the mistake in placing the fence, and the license and permission of plaintiff to build it inside his line, and its removal by defendant to the true dividing line in a reasonable time after the error was discovered, the jury should find for plaintiff. The mere erection of the fence upon plaintiff's land did not operate to vest the title thereto in him.—*Matson v. Calhoun*, 368.

See PRACTICE, CIVIL—TRIALS, 7. REVENUE, 1.

MORTGAGES AND DEEDS OF TRUST.

1. *Husband and wife—Deed of trust of wife's separate property to secure debts of the husband—Liability of surplus in the hands of the trustee after sale for debts of the husband.*—Where a married woman, jointly with her husband, conveys her separate real estate by deed of trust to secure a certain debt of her husband, and the deed provided that if the property should be sold under the deed the proceeds should be applied to the payment of the debt, and the remainder, if any, should be paid to the parties of the first part—the husband and wife—or their legal representatives: *held*, that this remainder should be returned to the party of whose property it was the proceeds, and that by the provision of the deed it belongs to the wife alone.—*Kinner v. Walsh*, 65.
2. *Husband and wife—Deed of trust of separate real estate of wife to secure debts of the husband—Equity of redemption, to whom it descends—Surplus.*—Where a married woman, jointly with her husband, conveys her separate real estate to secure debts of her husband, and dies before sale under the deed, the equity of redemption descends to her heirs; and, upon her death, their right of property becomes complete, subject only to the trust deed and to the curtesy of the husband. That descent carries with it the right to any surplus arising from the sale of the property after paying the debt secured by the deed.—*Id.*
3. *Husband and wife—Debts of husband contracted during coverture—Property of wife not derived from her husband—Presumptions.*—The law authorizes no general presumption that the debts of the husband contracted during marriage were for the joint benefit of the husband and wife; and, if it did, it could not apply to the property of the wife held before coverture. Nothing is to be presumed against the separate estate of the wife, not derived from the husband, that does not arise from her deed.—*Id.*
4. *Deed of trust—Resale.*—At a sale of real estate under a deed of trust, where the highest bidder fails to pay the purchase money, the property may be resold by the trustee; and, in the absence of any satisfactory proof that the beneficiaries officiously or unfairly intermeddled with the duties of the trustee, or did anything to prevent other persons from bidding at the sale, or took any unfair advantage for the purpose of getting the property at a price below its value, the claim of the grantor for relief must fail. (*Dover v. Kennerly et al.*, 33 Mo. 469, affirmed.)—*Dover v. Kennerly*, 145.
5. *Mortgages and deeds of trust—Attachment—Unrecorded mortgages, when good against.*—An unrecorded mortgage on land is good against the lien of a subsequent attachment thereon, if recorded before judgment and execution sale in the attachment suit. (*Davis v. Ownby*, 14 Mo. 170, and *Valentine v. Havener*, 20 Mo. 133, affirmed; *vide also*, *Potter v. McDowell*, 43 Mo. 93.)—*Reed v. Ownby*, 204.

MORTGAGES AND DEEDS OF TRUST—(Continued.)

6. *Ejectment — Mortgagor — Life interest of, no bar to suit.*—Where suit in ejectment is brought against a mortgagor who has possession and a life estate in the property, he can not retain his possession by showing that, when his curtesy ceases, the heirs of his deceased wife may be entitled to it.—Allen v. Ranson, 263.
7. *Mortgages — Mortgagee with power of sale may purchase property, with what limitation.*—A mortgagee with power of sale is a trustee as well as a creditor, and, at his own sale, can not become the purchaser either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void. It is good as to all the world, and for all purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land.—*Id.*
8. *Conveyance — Mortgage — Conditional sale — Difference between — Absolute sale with cotemporaneous stipulation.*—A conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the deed, or however absolute it may appear on its face; and where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of the mortgage. But it is not true that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein gives a cotemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, the transaction would be a conditional sale notwithstanding.—Turner v. Kerr, 429.
9. *Conveyance — Mortgage — Conditional sale — What constitutes difference between.*—In determining whether a transaction is a mortgage or a conditional sale, the understanding and purposes of the parties are to be considered. If they intended an extinguishment of the debt, and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms—as a payment of an amount equal to the canceled debt and interest—such a transaction is a conditional sale, and not a mortgage. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of debt and interest, is a circumstance of no controlling importance.—*Id.*

See BILLS AND NOTES, 5. PRACTICE, CIVIL, 12, 13. TRUSTS. USURY, 1.

N

NEW TRIALS.

See PRACTICE, CIVIL, 4.

NON-RESIDENTS.

See JUDGMENTS, 1. PRACTICE, CIVIL, 6, 7.

NOTICE.

See ATTACHMENT, 4, 5. LAND AND LAND TITLES, 8.

O

OFFICERS.

1. *Office—Acts of 1865 and 1868, validity of—Circuit Attorney—Vacating ordinance, tenure of.*—The law providing for the election of circuit attorneys

OFFICERS—(Continued.)

- in 1866, and every four years thereafter (Gen. Stat. 1865, ch. 18, § 6), was void only so far as concerned officers holding under the vacating ordinance. (Gen. Stat. 1865, p. 47; *vide* 38 Mo. 419; 41 Mo. 58.) And where a circuit attorney was appointed and claimed his tenure of office, not under the vacating ordinance, but under the act of 1866, he could not hold as against a circuit attorney elected to the office at the general election of 1868. In point of legal conformity and principle, the acts providing respectively for elections in 1866 and 1868 are equally valid as to officers not holding under the vacating ordinance.—State ex rel. Attorney-General v. Davis, 129.
2. *Legislative office in the United States—Incumbent has no vested right in.*—In the United States, offices created by the Legislature are not held by grant or contract; nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact.—*Id.*
 3. *Recorder of deeds—Buchanan county—Term of office—Construction of statute.*—By the special act of 1864 (Adj. Sess. Acts 1863, p. 502, §§ 1, 3), the Legislature intended to establish a term of office of two years for the recorder of Buchanan county, the officer to be elected at each successive general election. But the object of section 25, chapter 26, Gen. Stat. 1865, fixing the term of office of recorder, under certain conditions, at four years, was to fix an equal and uniform term throughout the State in all counties similarly situated, and embraced in its purview the county of Buchanan. Sections 1 and 3, p. 502, Adj. Sess. Acts 1863, so far as they fix a term of two years, are therefore repugnant to section 25, chapter 26, Gen. Stat. 1865, and null and void.—State ex rel. Attorney-General v. Percy, 189.
 4. *Circuit judge, contest for office of—Statute concerning, unconstitutional.*—Section 80, chapter 2, Gen. Stat. 1865, authorizing the contestor of the office of circuit judge to bring the issue originally before the Supreme Court by petition, without appeal or writ of error, invests it with a jurisdiction not authorized, but prohibited, by the constitution.—Vail v. Dinning, 210.
 5. *Circuit judge, contest for office of—Does not warrant remedial writ.*—The contest for the office of circuit judge concerns a civil right, to be decided on the facts and issues, and does not call forth the extraordinary remedial writs of this court.—*Id.*
 6. *Circuit judge, contest for office of—May be settled in lower courts.*—The law, as it now exists, affords an ample and complete remedy where the issues between parties contesting the office of circuit judge can be tried, and if the result is not satisfactory, an appeal will lie to this court; and the Legislature may also prescribe new and additional means for determining such contests. But this court can not assume jurisdiction, nor hear and determine cases, except on appeal or on writ issuing from this court.—*Id.*
 7. *Mandamus—County treasurer, bond of; rejection of, creates no vacancy.*—Where A. was duly elected to the office of county treasurer, although he may have filed an insufficient bond, the action of the County Court in proceeding to reject the bond and declare the office vacant on the day when the bond was rejected, and appointing another person to fill the office, was totally unwarranted. If the time originally prescribed by law for filing the bond had expired when the proceedings were had, that created no forfeiture. The statute as to time was directory. The action of the court was a nullity, and did

OFFICERS—(Continued.)

- not deprive the relator of his right to present his new bond; and if it were considered sufficient by the court, he was still entitled to the office.—State ex rel. Blenkinship v. County Court of Texas County, 230.
8. *State Senate—Resolution—Clerk of committee—Per diem for services.*—The resolution passed by the State Senate, January 20, 1869, which provided that the clerk of the committee on banks and corporations should "not be entitled to more than one *per diem*," was not intended to prevent him from performing services for a committee of the State House of Representatives, and receiving a *per diem* therefor, while he was so employed and paid by the Senate.—State ex rel. Koch v. Draper, 278.
 9. *Sheriff—Collections by—Statute of limitations begins to run, when.*—The cause of action on the bond of a sheriff for failing to account for moneys collected by him does not accrue, so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties in interest, or until the officer has made a proper return or report to the court ordering the sale of the moneys realized therefrom.—State ex rel. Winburn v. Minor, 373.
 10. *Sheriff, duties of in collection of moneys.*—The liability of a sheriff for moneys collected on sales in partition is substantially the same as for moneys collected on execution. In either case it is his duty to report or make return of his proceedings into court.—*Id.*
 11. *Officer—Judicial and ministerial acts—Civil responsibility.*—A civil action does not lie against judges or magistrates, or persons acting judicially in a matter within the scope of their jurisdiction, however erroneous their decisions or corrupt and malicious their motives. But when duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains when judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a judicial capacity, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice.—Pike v. Megoun, 491.
 12. *Elections—Registering officers—Duties and powers not fully judicial.*—The officers of registration, under the act of 1865 (Gen. Stat. 1865, App. p. 904), were neither judges nor judicial officers in a legal sense. Their duties were partly ministerial and partly judicial. Although sections 9 and 20 of that act devolved on them extensive powers and required an exercise of judgment, they were not thereby to be considered judicial officers to the full extent.—*Id.*
 13. *Elections—Registering officers—Liability of, prior to the act of 1865—Construction of that act.*—Prior to the enactment of any registration law the judges of election exercised essentially the same power in determining the qualification of a voter as the registering officers now exercise under the present system; yet all the cases hold that an action may be maintained against a judge of an election where he refuses, when acting in that capacity, to permit a qualified voter to exercise the right of suffrage; but as the judge of the election had to exercise his discretion, and acted *quasi* judicially, it would be necessary to allege and prove that such refusal was knowingly wrongful, malicious, or corrupt. By the act of 1868 (Sess. Acts 1868, § 23), the Legislature

OFFICERS—(Continued.)

seems to have placed the same construction upon the act of 1865, touching the character of the registering officers.—*Id.*

14. *Elections—Registration act of 1865—Registration officers—Liability for refusing to receive votes.*—Under the law as it stood in 1866 (Gen. Stat. 1865, p. 904), the registering officers were not responsible for damages for refusing to register a person, however erroneous that refusal might have been, if it was produced merely by a mistake in judgment. But if the refusal was corrupt or actuated by malice, or to gratify personal spite, they would not be protected, but would be liable to an action by the person injured.—*Id.*

See ST. JOSEPH, CITY OF, 1. SHERIFF.

ORDINANCES, CITY.

1. City of St. Louis, to use of *Murphy v. Clemens*, 43 Mo. 395, affirmed.—City of St. Louis, to use of *Murphy, v. Buckner*, 19.

See ST. LOUIS, CITY OF, 6, 10, 11.

P

PARTITION.

1. *Partition, sale in—Dower, assignment of—Sheriff's return, construction of.*—Suit was brought by the heirs of David L. Caldwell for the partition of certain land, in which dower had been assigned to his widow, Margaret Caldwell. The petition set forth that the petitioners were the owners of certain property, describing its boundaries. The court ordered absolute sale of the premises. They were accordingly advertised and sold; and the sheriff's deed, after reciting the order, advertisement, sale, etc., conveyed to the purchasers "all the right, title, claim, and interest of said petitioners in said petition mentioned, in and to said described tract of land so sold as aforesaid," etc. But the sheriff, in his return of the sale, declared that all the land was sold "except so much of the same as was heretofore assigned to Margaret Caldwell, widow of said David L. Caldwell, as her dower interest in said tract." *Held*, that the return of the sheriff, taken in connection with his deed and the other proceedings in partition, should be construed to mean: "except such interest in the same as was heretofore assigned," etc., "as her dower interest in the tract," and that the portion of land assigned as dower was not thereby expressly reserved to the widow.—*Caldwell v. Layton*, 220.

PARTNERSHIP.

1. *Partnership settlements—Outgoing partner—Injunction—Receiver.*—Where articles of partnership provided that, in case of the death of any of the partners, violation of any of the articles of the agreement, or other dissolution of the partnership, a general account should be taken, and provided the manner of settlement of the concern and distribution of the assets; and plaintiffs, members of the partnership, sued for an injunction against the other partner, and the appointment of a receiver to settle the partnership affairs: *held*, that plaintiffs had no right to this mode of settlement until the defendant had first had an opportunity of closing up the concern under the articles of partnership. Had they waited until it appeared that the defendant could not or would not comply with the articles before referred to, or until it appeared that the creditors of the firm were not being provided for, and that the property primarily liable for the debts was being wasted or improperly diverted, a right of action

PARTNERSHIP—(Continued.)

would have accrued. But the plaintiffs have no right to assume that defendant would not have done his whole duty if he had had opportunity.—*Quinlivan v. English*, 46.

2. *Partnership—Administration—Surviving partner—Partnership articles—Covenant for conveyance in—Record of final settlement—Res adjudicata—Account of profits.*—A., being the owner of certain real estate with improvements, covenanted, in articles of partnership with B., that on receipt from B. of one-half the amount paid for the property, with interest, and half the running expenses, he would convey to him an undivided half of the property. On decease of A., B., as surviving partner, administered on the joint estate. *Held*, that the record of final settlement in the Probate Court, showing a balance of partnership payments in favor of B., was not conclusive evidence that the amount necessary to entitle him to a conveyance had been paid. It was not within the scope and purpose of final settlement to determine such questions. Such a covenant and the payments made in accordance with it were individual, and not partnership, transactions. The conveyance in such case certainly should not be enforced when no accounts were rendered by the administrator of the profits of the estate.—*Fish v. Lightner*, 268.

PRACTICE, CIVIL.

1. *Practice, Civil—Cotemporary suits in different courts, effect of.*—A. sued B., with other defendants, for partition of certain lands. Afterward, before the first suit was determined, B. brought suit in another court against the other defendants for the partition of the same lands, without joining A. in the suits; and a judgment was had in this second suit, a sale made, and a sheriff's deed of the land executed. In a subsequent trial, in a different action, an attempt was made to impeach the judgment in the second suit, and the sheriff's deed, on account of the pendency of the previous action. *Held*, that in the third action the proceedings in the second suit could not be treated as void because of the pendency of the first. It was the duty of the defendants in such second suit, when properly served, if they objected to answering in the courts, to have pleaded in abatement the proceeding pending in the other court. This is the universal practice. There may be circumstances which would authorize the double proceeding, and the matter should be brought to the attention of the court by plea, that it may pass upon the preliminary question before proceeding to final judgment.—*Bernecker v. Miller*, 102.
2. *Practice, Civil—Collateral judgments, impeachment of.*—A judgment can not be impeached collaterally for its defects. Such judgment and its recitals must be treated as correct until reversed.—*Id.*
3. *Mandamus—St. Louis Circuit Court—Time for filing exceptions—Construction of statute.*—The fourteenth section of the law organizing the St. Louis Circuit Court (Gen. Stat. 1865, p. 889) takes that court out of the operation of the general law (Gen. Stat. 1865, ch. 169, §§ 27, 28) permitting exceptions to be filed at any time during the term; and, by virtue of that special act, the St. Louis Circuit Court has power to prescribe the limitations for filing exceptions named in the 12th and 16th rules adopted by it, in the revision adopted January, 1866.—*State ex rel. Frank v. Smith*, 112.
4. *Practice, Civil—New trial, right to grant—Probate Court, power of.*—Courts of general common-law jurisdiction in England and the United States seem to have universally exercised the power of setting aside the verdict of

PRACTICE, CIVIL—(Continued.)

- juries found in their own courts, and granting new trials; and the statutory provision (Gen. Stat. 1865, ch. 169, § 25) authorizing new trials in certain cases is rather a limitation upon, than a grant of power to, the Circuit Court. But courts of inferior and limited jurisdiction have never been in the habit of exercising this power, and it can not be assumed that such power exists in the Probate Courts in the absence of authority given by the statute or of long usage.—*Bartling v. Jamison*, 141.
5. *Practice, Civil—Courts of record—Entries—Verdict—Power over.*—In general, all courts of record, whether of special and inferior or of general jurisdiction, can modify or set aside entries of their own action made during the term, but that does not involve the right to refuse to enter or set aside a lawful verdict.—*Id.*
 6. *Attachment—Non-residence—Notice, under act of 1855, should state the amount claimed.*—Where attachment was levied on certain land of defendant, on the ground of his non-residence, notice of the suit stating that the proceedings were “founded upon two promissory notes for the sum of \$386.94,” embraced a sufficient statement of the nature of the demand, under section 23, chapter 12, R. C. 1855; but is defective, under that section, in not stating whether the sum named in the notice was the amount claimed by plaintiffs; and execution issued on attachment based on such notice may be quashed.—*Haywood v. Russell*, 252.
 7. *Attachment—Non-residence—Notice, last publication of, how long before next term.*—Under the provision of 1855, concerning notice of attachment (R. C. 1855, ch. 12, § 23), it is not necessary that the commencement of the publication should be eight weeks before the next term of court, nor that the four weeks should end four weeks before the next term. It is sufficient if the publication be four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term.—*Id.*
 8. *Practice, Civil—Suit—Arbitration and award—Motion to confirm, withdrawal of.*—Where it was set up as a defense in a suit that the matter in dispute had been submitted to arbitrators, who had made an award, and defendants filed their motion to confirm the award, but afterward withdrew the same: *held*, that by such withdrawal defendants did not abandon that defense to the action. The proceedings to obtain judgment upon the award form no part of the suit.—*Bowen v. Lazalere*, 383.
 9. *Practice, Civil—Arbitration and award—Defense, setting up—Judgment.*—When an action for the recovery of a debt is pending, an agreement to arbitrate the matter in dispute is equivalent to an agreement, for a good consideration, to dismiss the suit. But such submission to arbitration can not be pleaded in bar until there is a good and binding award. In such case it is a full defense, and, in the absence of a traverse in the replication, will authorize a final judgment for defendant.—*Id.*
 10. *Practice, Civil—Arbitration and award—Answer pleading, must show that all arbitrators acted.*—Under the requirements of the statute (Gen. Stat. 1865, ch. 198, § 5), any number of arbitrators less than the whole are incompetent to sit; and an answer pleading arbitration and award by two out of three arbitrators is fatally defective, and may be disregarded.—*Id.*

PRACTICE, CIVIL—(Continued.)

11. *Arbitration and award—Plea of can not be set up after judgment.*—A plea of arbitration and award is waived by plea and trial on the merits, and can not be set up in abeyance after judgment.—*Id.*
12. *Practice, Civil—Mortgage—Contribution—Filing of mortgage—Construction of statute.*—Where one out of several grantees in a mortgage brings an action for contribution against another, it is not necessary that the mortgage be filed with the papers. That is necessary only where the action or pleading is founded on an instrument or pleading executed by the adverse party. (Gen. Stat. 1865, ch. 165, § 51.)—*Carr v. Waldron*, 393.
13. *Practice, Civil—Mortgage—Contribution—Defect of parties—Construction of statute.*—In a suit for contribution by one of several grantees in a mortgage against another, all the mortgagees had an interest, and demurrer to the petition would lie where all were not made defendants. (Gen. Stat. 1865, ch. 161, §§ 5, 6.) There having been no ascertainment or adjustment of the amounts to which each was entitled, all should have been brought in, so that there might be a final determination binding on all parties. But section 7, chapter 153, Gen. Stat. 1865, has no application to such a case.—*Id.*
14. *Arbitration and award—Motion to vacate, time of filing.*—Where a party aggrieved by an award suffered a term to elapse before filing a motion to vacate the same, he waived his remedy.—*Shores v. Bowen*, 396.
15. *Arbitration and award—Judgment on motion to vacate, demurrer to.*—A party aggrieved by an award has a right to file a paper in the nature of a demurrer to a motion for judgment on the award; and such paper, if properly filed, should not be stricken out on motion. Judgment on the arbitration and award is not granted as of course. Where the award was not vacated or modified or postponed, under the provisions of the statute (Gen. Stat. 1865, ch. 198, § 8 *et seq.*) the party aggrieved may defend himself against the motion, even though he may have neglected to apply in time to have the award vacated.—*Id.*
16. *Practice, Civil—Executions, stay of—Construction of statute.*—The sixty-seventh, sixty-eighth and sixty-ninth sections of chapter 160, pp. 648-9, Gen. Stat. 1865, simply give a party the privilege, and enact the means, of taking steps in vacation to have the further proceedings on an execution stayed until he can be heard in court as to whether it should be set aside or quashed. The proceeding is not exclusive, and does not prevent the usual resort to a motion to set aside or quash at the return term in open court.—*Parker v. Hannibal and St. Joseph Railroad Company*, 415.

See FRAUDULENT CONVEYANCES, 2. JUSTICES' COURTS.

PRACTICE, CIVIL—ACTIONS.

1. *Partnership settlement—Outgoing partner—Injunction—Receiver.*—Where articles of partnership provided that, in case of the death of any of the partners, violation of any of the articles of the agreement, or other dissolution of the partnership, a general account should be taken, and provided the manner of settlement of the concern and distribution of the assets; and plaintiffs, members of the partnership, sued for an injunction against the other partner, and the appointment of a receiver to settle the partnership affairs: *held*, that plaintiffs had no right to this mode of settlement until the defendant had first had an opportunity of closing up the concern under the articles of partner-

PRACTICE, CIVIL—ACTIONS—(Continued.)

- ship. Had they waited until it appeared that the defendant could not or would not comply with the articles before referred to, or until it appeared that the creditors of the firm were not being provided for, and that the property primarily liable for the debts was being wasted or improperly diverted, a right of action would have accrued. But the plaintiffs have no right to assume that defendant would not have done his whole duty if he had had opportunity.—*Quinlivan v. English*, 46.
2. *Forcible entry and detainer—Question of title not admissible.*—In an action of forcible entry and detainer, no question of title is admissible. All that devolves upon plaintiff in that proceeding is to show that he was lawfully possessed of the premises, and that defendant unlawfully entered into and detained the same.—*Goerges v. Hufschmidt*, 179.
3. *Practice, Civil—Action—Account—Justice's court—Statement of account not filed—Exceptions should be taken, when.*—In a suit upon an account, commenced before a justice of the peace and appealed to the Circuit Court, although the record failed to show that "an account or statement of the cause of action" was filed either before the justice or the Circuit Court, yet if no exceptions to the omission or to the rulings of the court, grounded on the defect, were taken in the Circuit Court, the case is not open to review in the appellate court.—*Beard v. Parks*, 244.
4. *Practice, Civil—Actions—Trespass—Shooting, injuries caused by—Participants all liable for.*—Where a number of persons met at the same time, and, by mutual understanding, arranged themselves on different sides, and engaged in combat with pistols, and a passer-by was wounded by one of the shots fired, they were held jointly and severally liable to the injured person in an action of trespass; and it was immaterial whether the defendants in the action fired the shot, or whether it was fired by some one else participating in the fray.—*Murphy v. Wilson*, 313.
5. *Practice, Civil—Actions—Trespass—Affray—Shooting—Allegata and probata.*—In an action of trespass for injuries done plaintiff by shooting, where the averments of the petition were that one of the defendants did the shooting, but all the defendants, together with others, made the assault, and engaged in the commission of the offense, testimony was proper and sufficient to sustain the action if it showed that plaintiff was shot by one of those participating in the affray, although not by one of those named as defendants.—*Id.*

See ACCOUNT, STATED, 1. ATTACHMENT, 2, 3. BAILMENT, 2. BILLS AND NOTES, 7, 8. EJECTMENT. FRAUDULENT CONVEYANCES, 2. MISTAKE, 1. PRACTICE, CIVIL—PLEADING, 9. REVENUE, 10. TROVER, 1.

PRACTICE, CIVIL—APPEAL.

1. *Practice, Civil—Appeal—Errors not appearing on the record or saved by exceptions not considered.*—The Supreme Court, upon issues triable by jury, uniformly declines to consider errors not appearing upon its record proper—i. e., the pleadings, process, motions, orders, verdicts, and judgments—unless saved by proper exceptions.—*Mortland v. Holton*, 58.
2. *Practice, Civil—Appeal—Right of court to amend its records after.*—Where, a cause having been appealed to the District Court, the record showed a dismissal as to a certain defendant, but no final judgment, and a writ of *certiorari* in the cause showed that the judgment had been ordered,

PRACTICE, CIVIL—APPEAL—*Continued.*)

but the clerk had omitted to enter it of record, the court below properly ordered its records amended *nunc pro tunc*, so as to show that final judgment followed the order of dismissal. The court had lost jurisdiction of the case, but not of its records.—*De Kalb County v. Hixon*, 341.

3. *Practice, Civil—Bill of exceptions—Refusal of judge to sign—Affidavits—Construction of statute.*—The statutory method of bringing up a bill of exceptions, where the judge refuses to sign it, by procuring the signatures of three bystanders, and filing affidavits sustaining it (Gen. Stat. 1865, ch. 169, § 30 *et seq.*), ought to be avoided if possible. To that end the judge who presided at the trial, under section 29, chapter 169, Gen. Stat. 1865, should state briefly wherein the bill is untrue, if he objects to it on that ground, and should assist the parties in making it up with his notes of testimony. But the law does not require that he should write the bill or change one presented to him.—*Bowen v. Lazalere*, 383.
4. *Practice, Civil—Bill of exceptions—Refusal of court to sign.—Affidavits.*—Where a judge refuses to sign a bill of exceptions as being untrue, and refuses to permit it to be filed, it will be held to be true, notwithstanding, if sustained by the requisite number of affidavits, unimpeached by counter-affidavits, even though the affidavits are sworn to by interested parties.—*Id.*
5. *Practice, Civil—Appeal—Supersedeas.*—In ordinary cases the effect of perfecting an appeal is to render inoperative the judgment of the lower court. The judgment is suspended, and no proceedings can be had under or by force of it, after the appeal is actually taken.—*Parker v. Hannibal & St. Joseph Railroad Company*, 415.
6. *Practice, Civil—Appeal—Judgments on motions.*—The Supreme Court will review the decisions of the inferior courts upon judgments rendered on motion.—*Id.*
7. *Practice, Civil—Appeal—Judgment on motion to quash—Bond—Supersedeas.*—An appeal from a judgment overruling a motion to quash an execution operates as a *supersedeas* of the judgment upon which the execution issued, upon the filing of a sufficient bond; and in such case an order could be entered of record, staying the execution till the appeal is determined. But the bond must comply with the requirements of the statute (Gen. Stat. 1865, § 12, p. 685), and be conditioned for the performance of the judgment as well as the payment of all damages and costs which may be awarded against the appellant in the Supreme Court. If not so conditioned, it does not stay the execution or have the force and effect of a *supersedeas*.—*Id.*
8. *Practice, Civil—Assignment of errors—In absence of, judgment affirmed.*—Where appellants neglect to file an assignment of errors, the judgment of the court below will be affirmed.—*Rannells v. Flynn*, 604.
See COURT, COUNTY, 1, 2, 3, LANDLORD AND TENANT, 5.

PRACTICE, CIVIL—PARTIES.

1. *Practice, Civil—Parties—Minor defendant.*—Where a defendant in a suit is a minor at the time of the service of the summons, but the record shows that she appears by counsel, and she becomes of full age before judgment is taken, the judgment is not void because of her minority at the time of service.—*Bernecker v. Miller*, 102.

PRACTICE, CIVIL—PARTIES—(Continued.)

2. *Practice, Civil—Trial—Amendments, when allowed, during.*—If facts are developed upon a trial which would enable defendant to impeach the transaction upon which the suit is based, and he is taken by surprise by these facts; or if other facts have come to his knowledge since making up the issues, or any other good excuse can be given for not having made up the issues, so as to admit the testimony he desires to offer, he should be permitted to amend upon terms. But a general application to amend an answer so as to set up fraud, without stating what amendment defendant wishes to make, is properly overruled in the discretion of the court.—*Allen v. Ranson*, 263.
3. *Practice, Civil—Actions—Parties—Question who are, not settled by agreement of counsel.*—The question who are the heirs of a party to a suit can not be set at rest by a statement of facts agreed upon by counsel in the case.—*Aubuchon v. Bender*, 560.

See ADMINISTRATION, 11. CONTRACTS, 5. PRACTICE, CIVIL, 13. PRACTICE, CIVIL—ACTIONS, 4. PRACTICE, CIVIL—PLEADING, 7.

PRACTICE, CIVIL—PLEADING.

1. *Practice, Civil—Pleadings—Offset—Debt due to one of two defendants sued on joint contract—Sureties.*—It has been long settled in this State that where suit is brought against several defendants on a contract executed by them jointly, a debt due from plaintiff to one of the defendants can be offset to the claim sued on. By the statutes of Missouri, contracts which by the common law are joint only are construed to be joint and several; and, by the practice act, judgment may be given for or against one of the parties, plaintiffs or defendants. These provisions so change the relations of parties that the authorities which forbid an offset of a debt due one of several defendants can have no force here; and even if this right of offset were not in general conceded, it certainly must be when the defendant who seeks to make it is the principal and his co-defendant is his security.—*Mortland v. Holton*, 58.
2. *Practice, Civil—Pleadings—Reply where one defendant pleads a several debt in offset.*—Where in a suit against several defendants one of them is permitted to offset the demand of plaintiff by a debt due to himself separately: *held*, that by way of reply to such offset plaintiff might set up a debt additional to the one sued on, due by this separate defendant to himself. This individual claim of the plaintiff, however, should not be permitted to extinguish any part of such separate defendant's offset intended to be or proper to be applied upon the debt growing out of the contract which formed the basis of plaintiff's demand, either by agreement or connection with the subject matter of the contract.—*Id.*
3. *Practice, Civil—Pleadings—Answer—Reply—Counter claim—New matter.*—A debt owing to plaintiff by one of several defendants, who puts in a separate claim against the plaintiff, is, in one sense, an "answer at law" to that claim. It shows a state of facts existing at the time the separate claim is put in—a mutual indebtedness, an unadjusted account—that renders it unjust to permit one party to bring in his side of the account and shut the other out. It need not be called a counter claim; it lacks one of its elements, as the plaintiff should not be permitted to recover a judgment upon it; but it is new matter, that shows that defendant should not be permitted to recover so much of his account as equals this claim.—*Id.*

PRACTICE, CIVIL—PLEADING—(Continued.)

4. *Practice, Civil—Reply setting up additional debt of a separate defendant who has set up a separate offset, not a departure.*—A reply setting up a debt or claim of plaintiff, in addition to the joint claim sued on, against a several defendant, who has set up a several demand against plaintiff as an offset, is not a departure. A departure is an abandonment of the original cause of action or defense for another. Such a reply sets up no new cause of action; it only bars a defense.—*Id.*
5. *Practice, Civil—Pleadings—Departure, when objected to.*—A departure must be objected to before verdict; a verdict in favor of him who makes a departure cures the fault, if the matter is in substance a sufficient answer to what is before pleaded by the adverse party.—*Id.*
6. *Practice, Civil—Pleading—Answer—Avoidance.*—Where a suit was brought against a constable for an unlawful levy under an execution, an answer which attempted to avoid liability by stating that the constable took from the plaintiffs in the execution, bonds to indemnify him against all claim or harm, was properly stricken out on motion. The bond was not authorized by law, and furnished no protection to the officer against his trespass.—*State, to use of Reagan, v. Romer, 99.*
7. *Practice, Civil—Defect of parties, how taken advantage of—Demurrer.*—It is too late to urge as ground of error, in this court, that the petition is defective by reason of non-joinder of parties. Defendant, to avail himself of such defect, should resort to demurrer. By failing to do so, he waives the objection. (Gen. Stat. 1865, ch. 165, §§ 6-10.)—*Kerr v. Bell, 120.*
8. *Practice, Civil—Pleadings amended to conform to evidence, when.*—Where plaintiff's petition stated that certain real estate in controversy was paid for in cash, and the evidence showed payment by conveyance of other real estate, the court properly allowed plaintiff to amend his petition so as to make it conformable to the facts proved. (Gen. Stat. 1865, ch. 168, § 3; 42 Mo. 101.)—*Id.*
9. *Practice, Civil—Pleadings—Action—Account—Item—Contract, privity of.*—A statement of an account between A. and B. showed certain balances against A. C., having purchased the stock of A., wrote an indorsement on the back of the account, assuming the same, and obligating himself generally to pay it, but without any privity of contract with C. B. brought suit against C. upon the stipulation, without setting out in his petition the items of the account as provided by section 38, p. 661, Gen. Stat. 1865; but filed the account showing the balances against defendant. *Held*, that, for the purpose of the suit, the filing of that paper was sufficient, and that B. was not in such sense a stranger to the consideration of the contract as to prevent him from suing thereon in his own name.—*Meyer v. Lowell, 328.*
10. *Practice, Civil—Pleadings—"Plain and concise statement of facts," what is meant by.*—The "plain and concise statement of facts" required by the statute does not refer so much to the style of the pleader—to his command of terse and simple English—as to the attempt sometimes made to give a long and prolix history of the transaction upon which the suit is based, and encumber the pleadings with a number of impertinent allegations.—*McGlothlin, Adm'r of Moore, v. Hemery, 350.*
11. *Administrator—Note secured by deed of trust—Sale of land under—Bill in equity to redeem—Usury—Tender.*—Where the amount due on a note

PRACTICE, CIVIL—PLEADING—(Continued.)

secured by a deed of trust on real estate is tendered by the administrator of the original maker, and is refused, he may immediately afterward file his petition to redeem the land; and if it be sold under the deed after tender, he may still obtain an order to set aside the sale and redeem the property; and if he needs the money to be derived from an administration sale of the land in order to pay the debts of the estate, he is a proper plaintiff in a bill for cancellation of the sale under the trust deed. If the amount called for by the trust note is in part usurious, the administrator, under section 4, chapter 89, Gen. Stat. 1865, may refuse to pay the usurious portion of it, and need only make tender of the balance.—*Id.*

12. *Practice, Civil—Pleading—Bill in equity—Multifariousness.*—Multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action. Distinct facts forming a series of transactions tending to a common end, or all necessary to plaintiff's equity, do not constitute multifariousness, nor does redundant or irrelevant matter that may be stricken out on motion, under section 20, chapter 165, Gen. Stat. 1865.—*Id.*
13. *Practice, Civil—Bill in equity—Prayer for relief.*—In a bill in equity, if the petitioner make a case which will entitle him to some relief in the power of the court to grant, although he may mistake as to the specific relief, he will not, in consequence, be turned out of court; much less, if he has one good specific request and a general prayer. All that portion of the prayer not warranted by the petition is a nullity, and should be treated as surplusage.—*Id.*
14. *Practice, Civil—Pleadings—Contracts—Consideration—Averments—What omissions cured by verdict.*—If the record in a suit is radically defective—as, if it shows that there was no obligation, no legal indebtedness, or that the judgment was rendered on a *nudum pactum*—the error may be taken advantage of afterward. But the mere omission to set out a fact as the consideration, or the whole consideration, on account of which omission a demurrer could have been maintained, or any fact that must have been found by the jury, is cured by the verdict.—*Kercheval v. King*, 401.
15. *Practice, Civil—Pleadings—Contract—Consideration—Averments.*—In a suit upon a contract, where the main object of the contract was the sale of certain property of plaintiff to defendant, and, as a consideration for the sale, defendant made sundry independent agreements, an action would lie for a violation of one of defendant's agreements without setting up the other, but the provision concerning the sale should be set out in either case.—*Id.*
16. *Practice, Civil—Pleading—Want of demand.*—Want of demand by plaintiff, to be of any avail to defendant, must be pleaded.—*Fisher v. City of St. Louis*, 482.
17. *Practice, Civil—City of St. Louis—Contract—Suit for price—Tax bills.*—The city of St. Louis agreed with plaintiff to pay for certain work in tax bills. The work was done, but the tax bills proved to be invalid. *Held*, that plaintiff properly brought suit to recover the contract price for the work, without returning the void bills and demanding others; nor was he obliged to sue for failure to issue and deliver proper tax bills.—*Id.*
18. *Practice, Civil—Pleadings—Allegations.*—In an action for damages against a railroad company, an allegation that it was the duty of defendant to employ

PRACTICE, CIVIL—PLEADING—(Continued.)

a suitable engineer, and that it failed and neglected to do so, does not authorize proof that a fireman, in the absence of the engineer, did manage and control the locomotive. The petition should allege that defendant authorized or allowed the fireman to do such act.—*Harper v. Indianapolis & St. Louis Railroad Company*, 488.

19. *Practice, Civil—Special pleas in bar—Inconsistency.*—The old special pleas in bar were technically supposed to confess and avoid, although in fact they might not confess at all. Hence, in a technical sense, they were inconsistent with a denial; but they were not held to be so inconsistent as not to be pleadable together, unless there was an absolute incompatibility of facts.—*Nelson v. Brodhack*, 596.

20. *Practice, Civil—Note—Pleas—Special in bar, and non est factum.*—In a suit on a note, pleas of *non est factum* and payment, or release or other discharge, are not necessarily inconsistent.—*Id.*

21. *Practice, Civil—Pleadings—Inconsistency—Meaning of, in the statutes.*—The consistency required by the statute (Gen. Stat. 1865, ch. 165, § 14) is one of fact merely. Two or more defenses are held to be inconsistent only where the proof of one necessarily disproves the other. But, under our system, the facts should be so set out in the pleading that both defenses may be true.—*Id.*

22. *Practice, Civil—Pleadings—Statute of limitations vests title in plaintiff.*—The statute of limitations, where it operates, vests the absolute title of the property, and there is no more necessity of pleading it to an action of ejectment than though defendant held the plaintiff's title.—*Id.*

See ACCOUNT, STATED, 1. PRACTICE, CIVIL, 8, 9, 10, 11, 14, 15. QUO WARRANTO, 2, 3. REVENUE, 11.

PRACTICE, CIVIL—TRIALS.

1. *Instructions—Evidence.*—Instructions based upon a state of facts not in evidence are erroneous, and should not be given.—*Rose v. Spies*, 20.

2. *Instructions—Commenting on evidence.*—A court has no right to comment on the evidence or single out particular facts and tell the jury that if they find them in a certain way they shall give their verdict accordingly.—*Id.*

3. *Practice, Civil—Trials—Court sitting as a jury—Instructions—Review.*—Where the statute provides, in a civil action, that the damages shall be assessed by a jury, unless it is waived, the action of the court in such assessment is subject to the incidents of a jury trial, and instructions or declarations of law may be reviewed by the Supreme Court.—*Quinlivan v. English*, 46.

4. *Practice, Civil—Trials—Instructions not applicable to question before the court, erroneous.*—Although the proposition embraced in an instruction is correct, yet if it does not affect the question before the court it is erroneous, and should not be given.—*Id.*

5. *Practice, Civil—Trials—Instructions.*—General and abstract instructions may mislead the jury, and should not be given.—*McDermott v. Donegan*, 85.

6. *Practice, Civil—Trials—Instructions must be predicated upon the whole case.*—Where, in the course of a trial, a fact was developed by the testimony of one witness, it was error for the court to instruct the jury that if they believed that fact to be true they should find for a designated party accordingly. Instructions should be predicated upon the whole case and take in all the evidence.—*First National Bank of Warsaw v. Currie*, 91.

PRACTICE, CIVIL—TRIALS—(Continued.)

7. *Practice, Civil—Trials—Fraud—False entry on record—Judgment—Presumptions.*—If the court is so imposed upon as to suffer a false entry of appearance by a defendant to be made, when the defendant neither appeared, nor suffered any one to appear for him; if from defendant's want of knowledge of the English language, and his general ignorance of what was progressing or of its effects, he was actually deceived by the plaintiff, and by his acts was induced to lie idle, and suffered injury in consequence, it is a fraud in fact, which, if made to appear in a proper way, would destroy any rights which plaintiff may have acquired from his legal proceedings. But courts will not assume that such frauds are practiced, and will not find them unless upon proper issues and clear proofs.—*Bernecker v. Miller*, 102.
8. *Instructions—Refusal of—Evidence.*—Instructions not based upon evidence are properly refused.—*Goerges v. Hufschmidt*, 179.
9. *Practice, Civil—Trial—Instructions should not reiterate each other.*—If an instruction is simply a reiteration of other instructions given, and embraces no new proposition applicable to the case, it need not be given. Courts should simplify their directions to the jury, and ought not to embarrass them by elaborations of the same point in different ways.—*State, to use of Heed, v. King*, 238.
10. *Practice—Evidence, objections to—Reasons for must be assigned at the time.*—Objections to admission of testimony will not be noticed on appeal unless the reason therefor be given.—*Id.*
11. *Practice, Civil—Trial—Amendments, when allowed, during.*—If facts are developed upon a trial which would enable defendant to impeach the transaction upon which the suit is based and he is taken by surprise by these facts; or if other facts have come to his knowledge since making up the issues, or any other good excuse can be given for not having made up the issues, so as to admit the testimony he desires to offer, he should be permitted to amend upon terms. But a general application to amend an answer so as to set up fraud, without stating what amendment defendant wishes to make, is properly overruled in the discretion of the court.—*Allen v. Ranson*, 263.
12. *Practice, Civil—Trial—Evidence—Instructions.*—Where there is any evidence in a trial tending to prove the issues of fact in a case, it must go to the jury, although the legal effect of those facts is a question of law upon which instructions may be given.—*Bowen v. Lazalere*, 383.
13. *Practice, Civil—Instructions—Jury—Evidence.*—Where there is testimony in support of the answer in a suit, defendant has a right to the opinion of the jury upon the issue raised by it unless the answer fails to make out a case that entitles him to relief. An instruction, in such state of proof, taking the case from the jury, where the answer is sufficient, is improper.—*Owens v. Rector*, 389.
14. *Practice, Civil—Instructions.*—The giving of instructions not based on evidence is erroneous.—*Harper v. Indianapolis and St. Louis Railroad Company*, 488.
15. *Practice, Civil—Verdict—Where responsive, etc., refusal by court to receive improper.*—After a jury have pronounced their verdict, the court may, before receiving it, request them to retire and reconsider; and in such case they may change or adhere to their verdict, at their option. But where the verdict is sensible, consistent, and responsive to the issues, the court can not absolutely

PRACTICE, CIVIL — TRIALS—(Continued.)

and finally reject and refuse to record the same, even though it be clearly against the evidence, and contrary to the law as laid down by the court. The statute (Gen. Stat. 1865, ch. 172, § 3) has made ample provision, by motion for new trial, for rectifying errors in verdicts, and preventing injustice or mistakes on the part of juries.—State ex rel. Nicholson v. Rombauer, 590.

See EQUITY, 13.

PRACTICE, CRIMINAL.

1. *Practice, Criminal—Indictment—Habeas corpus—Discharge—Construction of statute.*—Section 28, chapter 213, Gen. Stat. 1865, by which a person indicted for any offense is entitled, subject to certain conditions, to be brought to trial before the end of the third term thereafter, was intended to apply to the Circuit Courts in the State exercising criminal jurisdiction, wherein only two terms are held during the year, and not to the Criminal Court of St. Louis county.—Ex parte Donaldson, 149.
2. *Criminal law—Indictment—Continuance, discretion vested in courts in matter of.*—Where, under section 29, chapter 213, Gen. Stat. 1865, a continuance is granted to the State by the court, every inference is to be made in support of its rulings, and courts are bound to believe that the facts existed which, according to law, justified the continuance.—Id.
3. *Criminal law—Circuit attorney—Nolle prosequi—Discharge.*—The circuit attorney has the right to enter a *nolle prosequi*, with the assent of the court, at any time before the prisoner is put upon his trial; and there is nothing in such proceeding to prevent the prisoner from being further held amenable.—Id.
4. *Crimes and punishments—Offense consisting of different grades—Instructions limiting verdict to one grade.*—It is the established doctrine in this State that upon the trial of a person indicted for an offense consisting of different grades, the court may, by suitable instructions, if the evidence warrants it, direct the jury that the case, as made out by the evidence, belongs to one of the specified grades, and that, if the evidence is believed, they must find their verdict accordingly.—State v. Joeckel, 234.
5. *Crimes and punishments—Sentences at different terms of court upon the same person, effect of.*—Section 9, chapter 207, Gen. Stat. 1865, concerning terms of imprisonment in case of a criminal convicted of more than one offense, applies only where he is convicted of two or more offenses at the same term; and both convictions, under that provision, must take place before the sentence is pronounced in either case. And where a prisoner was sentenced, at the March term, 1866, of the St. Louis Criminal Court, to imprisonment for two years, for grand larceny, and at the May term of the same court he was again convicted and sentenced on another indictment for grand larceny for a period of three years, he will be entitled to his discharge at the expiration of three years.—Ex parte Meyers, 279.
6. *Criminal law—Courts have no common-law jurisdiction—Separate sentences, how pronounced.*—The courts in this State have no common-law jurisdiction in felonies. The powers that they exercise are such as are conferred by statute only; and separate sentences can only be passed upon the prisoner in the cause in the manner provided by statute.—Id.
7. *Crimes and punishments—Imprisonment commences with day of sentence—Criminal can not afterward be tried till expiration of term.*—As a general

PRACTICE, CRIMINAL—(Continued.)

rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment. Then, in legal contemplation, he is in custody different from that of the Criminal Court, and can not again be put upon trial till he has served out the term of imprisonment assessed against him.—*Id.*

8. *Criminal law — Perjury — Indictment for falsely taking oath of loyalty.*—An indictment for falsely taking the oath prescribed by section 6, art. XIII, of the State constitution, charging defendant with having "enrolled and caused himself to be enrolled" as disloyal, is not contradictory. Instead of following the language of section 3, art. II, and using the disjunctive "or," the indictment, in such cases, should properly employ the word "and," unless it unites things that are repugnant. And it was unnecessary to set forth the purpose or intent of the enrollment. The phrase in section 3, art. II, "or for any other purpose," superadded to the other objects of enrollment, makes the section mean the same thing as though no object or purpose was mentioned. Defendant may show a good reason for his enrollment. But the special emergency relied upon to justify in the particular instance is a matter of defense.—*State v. McCollum*, 343.

PRESUMPTIONS.

See *BILLS AND NOTES*, 8. *CORPORATIONS*, 2. *HUSBAND AND WIFE*, 3. *LAND AND LAND TITLES*, 7.

PROHIBITION, WRITS OF

See *COURT, SUPREME*, 2.

PUBLICATION.

See *ATTACHMENT*, 4, 5.

Q

QUO WARRANTO.

1. *Quo warranto, writ of—Information in nature of a civil proceeding—Burden of proof in proceeding under.*—An information in the nature of a writ of *quo warranto* is essentially a civil proceeding; and where such an information was brought to try the right of respondent to the office of secretary of a certain insurance company: *held*, that the burden of proof was upon the relator, and that every reasonable intendment was to be made in favor of the regularity of the proceedings by which respondent was put in office. They were the acts of a private corporation, and are to be presumed regular until the contrary appears.—*State ex rel. Bornefeld v. Kupferle*, 154.
2. *Quo warranto—Subject to general rules of pleading.*—An information in nature of a *quo warranto* is a pleading which must be answered or demurred to, and the general rules of pleading are applicable to proceedings therein.—*State ex rel. Attorney-General v. Steers*, 223.
3. *Quo warranto—Pleadings in—Allegations of, should be denied—Elections—Title to office derived from election, not commission—Sheriff of Ralls county.*—Where an information in the nature of a *quo warranto* charged that defendant was holding and exercising the office of sheriff by virtue of the election of 1868, and in consequence of a certificate wrongfully issued by the clerk of the County Court, upon which a commission issued; an answer that defendant was duly elected in 1866, and that no successor had been qualified,

QUO WARRANTO.—*Continued.*)

was bad, for duplicity, and might be construed to mean that he was holding under either election, for the reason that no person had succeeded him in office. The allegation in the petition should have been denied. A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is an unlawful holding, and he may be ousted at the instance of the State, notwithstanding his commission.—*Id.*

See COURT, SUPREME, 2. ST. JOSEPH, CITY OF, 1.

R

RAILROADS.

1. *County bonds; Schuyler county railroad—Implied consideration—Not subject to equities in the hands of assignees.*—In proceedings for *mandamus* by the purchaser of certain bonds issued by Schuyler County Court to the North Missouri Railroad Company to enforce payment thereof: *held*, that although said bonds did not contain the words "value received, negotiable and payable without defalcation," as provided by the act concerning "bonds, bills, and notes" (R. C. 1855, ch. 21, §§ 2, 3), yet they imported a consideration and possessed the ordinary elements of negotiable instruments; and, in the hands of an innocent holder for value, before maturity, were not subject to antecedent equities. The act concerning bonds, etc., had in view classes of paper not usually employed in banking and commercial operations, and not adapted or intended for such uses. It was not meant to embrace bonds put in circulation as commercial securities, to be sold and used by a railroad company in defraying expenses of its road.—*Barrett v. County Court of Schuyler County*, 197.
2. *County railroad bonds—Subscription—Election—Ratification of, defects in.*—In a suit to enforce payment of bonds given by a county to a railroad company, in payment of subscriptions by the county to the stock of the company, although it appear that at the time the court authorized the subscription no election had been held to ascertain the sense of the tax-payers of the county in reference thereto, yet if it appeared that the county, by its duly authorized agent, voted on said stock subscription for more than twelve years, such action of the county was, for the purposes of this suit, a waiver of the defects in the original subscription. Moreover, the issue of the bonds, years after the time of the subscription, was a ratification thereof, and warranted a purchaser of them in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been complied with or waived.—*Id.*
3. *State ex rel. Mo. & Miss. R.R. Co. v. Macon County Court*, 41 Mo. 453, affirmed.—*Chillicothe & Brunswick R.R. Co. v. Mayor of Brunswick*, 553.
See CORPORATIONS, 1, 2. EXECUTIONS, 3, 4, 5. PRACTICE, CIVIL—APPEALS, 5, 6, 7. REVENUE, 12, 14.

RECORDS.

See CONVEYANCES, 14, 15. EVIDENCE, 11.

REPLEVIN.

See CONTRACTS, 19. SALES, 12.

RES ADJUDICATA.

See PARTNERSHIP, 2.

REVENUE.

1. *Revenue—Sewers—Special tax bills—Mistake in name of owner does not vitiate—Construction of statute.*—An omission or mistake in the tax bill regarding the name of the true owner of property against which a tax is levied, under section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1847, pp. 75-6), does not vitiate the bill. The requirement of the statute making it the duty of the engineer to insert in the bill the name of the owner of the special lots assessed, is directory merely. But the rights of the owner can not be affected by such error until he has had his day in court.—*City of St. Louis, to use of Rotchford, v. De Noue*, 136.
2. *Revenue—Special tax bills, judgment on, how limited.*—In suits brought on special tax bills, under the provisions of section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1867, pp. 75-6), judgment should be limited to the property and its owners. If not, it is erroneous; and a personal judgment against the parties to a deed of trust on certain real estate for taxes assessed against it is unwarranted, although such parties may have been properly joined in the suit, as having an interest in the property covered by the tax lien.—*Id.*
3. *Sheriff—Collector of taxes—Official bond, liability on.*—The doctrine that a sheriff is liable on his official bond for his wrongful acts under color of office has been long established in Missouri; and his liability extends to him as collector of taxes in those counties where it is made his duty to collect them.—*State ex rel. Rice v. Powell*, 436.
4. *Revenue—Land, judgment on for taxes on personalty.*—There is no shadow of warrant for rendering judgment upon land for taxes due on personal property.—*Id.*
5. *Damages—Sheriff—Taxes, refusal to receive—Official bond, liability on—Measure of damages—Money paid voluntarily.*—A sheriff who refuses to receive the legal taxes assessed upon real estate, and returns the land delinquent because the owner failed to pay a tax assessed on his personal property, was altogether mistaken in his duty, and failed, according to the condition of his bond, "to faithfully perform all the duties of his office of collector according to law." But he would not be liable to the owner upon his bond for the taxes on the personalty, with interest and costs, which the latter paid under judgment of the County Court against his delinquent land, and might have avoided by appearing in the court prior to judgment, and attending to his interests. Such taxes must be held to have been paid voluntarily, and can not be recovered back in an action at law.—*Id.*
6. *Revenue—Street opening, tax assessments concerning—Constitutional construction of statute.*—It is the settled doctrine in this State that the special provisions of the act of March 24, 1868, amendatory of the St. Louis city charter (Adj. Sess. Acts 1868, p. 239), touching tax assessments for opening of streets, are not repugnant to the constitution. And the decisions in this State are in perfect harmony with the whole current of adjudications in other States.—*Uhrig v. City of St. Louis*, 458.
7. *Revenue—Street opening—Tax of ten per cent. against the city of St. Louis, constitutional.*—The particular provisions of the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 239, § 3), limiting the assessments for street

REVENUE—(Continued.)

opening, against the city of St. Louis, on account of the general benefit to be derived therefrom, to ten per cent., are lawful. The levy of the assessment upon adjoining property-owners is an exercise of the taxing power; and the Legislature, in the exercise of this power, was at liberty, in its discretion, to impose the whole burden of the cost of the proposed improvements upon them. And so it might, in its discretion, limit or extend the district to be taxed, and thus increase or diminish the sum to be paid to any particular proprietor. The imposition of a portion of the tax, not exceeding a tenth, upon the city at large, is to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint.—*Id.*

8. *Revenue—Ordinance for opening Washington avenue valid, although condition therein might be null.*—The ordinance enacted under the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 238), providing for the widening of Washington avenue at the junction of Jefferson avenue, in the city of St. Louis (ordinance 6,507), is valid, even though the condition thereto annexed—which provided that the ordinance should be null in case the Lindell Railway Company should not, within a limited time, indemnify the city, etc.—should be held invalid.—*Id.*
9. *Revenue—Act of Congress—Bank shares—Taxes—Assessments made, how.*—Under the provisions of section 41 of the act of Congress of June 3, 1864, re-enacting and amending the act of February 25, 1863 (U. S. Laws 1863-4, p. 112), the county collector should make his assessments for taxes on bank shares against the shareholders personally, and has no right to collect the tax by selling the property of the bank, or the shares or other property of the shareholders, except that of the delinquent.—*First National Bank of Hannibal v. Meredith*, 500.
10. *Revenue—Banks—Act of Congress—Illegal tax—Injunction, when proper.*—Injunction by a bank organized under act of June 3, 1864, to restrain the collection of taxes, is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief.—*Id.*
11. *Revenue—Banks, under act of Congress of June 3, 1864—Assessments against banks for tax on shares—Injunction—Demurrer.*—Suit by a banking institution organized under act of Congress of June 3, 1864, to enjoin the collection of taxes assessed against itself on its bank shares, has no equity. The bank, as a corporation, will lose nothing if the shares of its stockholders are sold. The shareholders are the ones who suffer, and they, if any one, are entitled to relief. In such suit demurrer will properly lie for that reason.—*Id.*
12. *Railroads—Railroad act of 1868—County bonds—Constitution.*—Bonds issued by a township under the act to facilitate the construction of railroads in Missouri (Sess. Acts 1868, p. 92), are not in any sense county bonds; and the County Courts and counties named are merely made use of as agencies to carry out the object contemplated by the act. Hence, that act is not antagonistic to section 14, art. XI, of the State constitution.—*State ex rel. N. M. Central R.R. Co. v. Linn County Court*, 504.
13. *Revenue—Taxes and subscriptions by municipal corporations—Legislature—Powers of.*—The law is now well settled in the United States, that the Legislature, having the control of the municipal organizations, and the power to enlarge or abridge their powers at pleasure, may make them the

REVENUE—(Continued.)

instruments in carrying out works of public improvement, and may authorize them to make the subscription and levy taxes and issue bonds to meet the assessments thereon. The new constitution has not abridged this power. It only requires a different mode of procedure, and the assent of two-thirds of the qualified voters before a subscription shall be authorized.—*Id.*

14. *Revenue — Taxation, under act for constructing railroads in Missouri — Assessment for benefits — Constitution.*—The provision in the act to facilitate the construction of railroads in Missouri (Sess. Acts 1868, p. 92, § 2), requiring that the taxes for the payment of bonds issued for that purpose shall be based exclusively on real estate, is more in the nature of an assessment for benefits than general taxation. The lands are adjudged to be benefited by the improvements and are taxed in proportion to the amount of such benefit, and the whole tax and expense is levied upon them. And the principle applies in its fullest extent to railroads. Section 16, art. XI, of the constitution, against exempting property from taxation, has reference only to ordinary and general taxation for the purposes of revenue; and assessments of taxes under section 2 of the above act are not such taxations as are contemplated by the general terms of the constitution.—*Id.*

ROADS, COUNTY.

See COURT, COUNTY, 1, 2, 3, 4.

S

ST. CHARLES, CITY OF.

1. *St. Charles, city of — Engineer — Street opening — Damages, assessment of — City not compelled to pay — Construction of statute.*—The charter of the city of St. Charles (Sess. Acts 1849, p. 272) in effect declared that property should not be used for opening or widening streets till damages assessed in favor of the property owners were paid, but did not provide for the rendition of any judgment, or point out any mode for the collection of damages. Under that provision, the property of appellant was condemned for the opening of a street, and damages were assessed in his favor. On appeal to the Circuit Court from the finding of the jury, appellant obtained an award for a further amount against the city. *Held*, that the statute providing for the issuing of *mandamus* against corporations, requiring them to levy special taxes for the payment of judgments outstanding against them where an execution has been unavailing (Gen. Stat. 1865, ch. 161, §§ 77-79), has reference to a common-law judgment, regularly rendered and mutually binding, and not to such an award.—*State ex rel. Rogers v. Hug*, 116.
2. *Corporations, city — Opening of streets — Assessment of damages — Payment, title of property before.*—After assessment of damages to property owners for opening of streets, the city may, at her option, on payment of costs, desist from the undertaking and leave parties *in statu quo*. Such assessment does not invest the city with the right of property, nor divest the title of the property-holder till payment of the amount assessed. (*City of St. Joseph v. Hamilton*, 43 Mo. 282, affirmed.)—*Id.*

ST. CHARLES COLLEGE.

1. *Corporations — St. Charles College — Amendment of charter impaired obligation of contract.*—By the charter of "St. Charles College," it was required
43—VOL. XLIV.

ST. CHARLES COLLEGE—(Continued.)

to be "an institution, purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive to reasonable or liberal-minded persons, whatever may be their religious opinions." The amendment of the charter, approved February 6, 1847 (Sess. Acts 1847, p. 226), provided that "the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South" should "be requisite in filling all vacancies in the board; upon the conference affording to the board satisfactory assurances for the maintenance and endowment of the college." *Held*, that the amendment, by requiring the concurrence in the choice of curators, of an ecclesiastical body representing one of the religious denominations of the State, endangered, in this regard, the principles of the foundation; and, even if it did not, it changed the character of the administrators of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impaired the contract upon which he advanced it.—State ex rel. Pittman v. Adams, 570.

2. *Corporations, moneyed and charitable*—*Stockholders*—*Visitors*.—In moneyed corporations, the trustees have no general powers. They are simply the agents of the shareholders, and under their control. The law of visitation, as applied to charities, has no application to them. But in eleemosynary corporations there are no stockholders, and regulations that ordinarily are made by them, and disputes that are submitted to the courts, are made and decided by those intrusted with the visitatorial power.—*Id*.
3. *Corporations*—*Moneyed and eleemosynary*—*Visitors*—*Duties of*.—In this country, moneyed corporations composed of shareholders, for whose use and benefit the charter is granted, may, in general, accept amendments thereto. But in charities the corporators are not the owners of the fund; neither is it held for their use. Their consent would not affect their own property but that of others, and their office of visitors, so far from giving them power to authorize any change in its management and control, contrary to the will of the founder, imposes upon them rather the obligation of seeing that that will is made paramount.—*Id*.
4. *Corporations*—*Visitors may consent to legislative change, when*.—Various changes may be found necessary in furtherance of the objects of a charitable institution which its visitors should have authority to make, or assent to, if such objects require an amendment to the charter. But if the general power of consent to legislative amendments is lodged in the directors or curators, there is no security whatever in eleemosynary grants.—*Id*.
5. *Corporations, eleemosynary*—*Legislative amendments*—*Curators*—*Consent of*.—The curators of an eleemosynary institution, the grant of which by the Legislature is absolute, subject only to the conditions imposed, have no power over the charter, but on the contrary it is their creator and their absolute rule of conduct. The beneficial interest in the charity fund belongs neither to them nor the State, but to the beneficiaries only, who, from the nature of the case, can not consent to any changes in the charter. Hence, its essential conditions are permanent, so far as change depends upon consent,

ST. CHARLES COLLEGE—(*Continued.*)

and the acceptance of a legislative amendment to the charter of such an institution by its board of curators gives it no validity.—*Id.*

6. *Corporations—Officers, removal of, for disloyalty—Act of March 23, 1863, validity of.*—The Legislature of this State, pending the late contest, had power to take measures to remove from the management of corporations of a public nature those who came within the purview of the oath commonly called the convention oath. (*Vide* act of March 23, 1863, Sess. Acts 1863, p. 12.) The act was not a violation of the contract embraced in the charter, for fidelity to the State is embraced in every such contract. The duty of loyalty is antecedent, perpetual, and paramount; and, in granting a charter, the State can make no engagement to dispense with that duty.—*Id.*
7. *Act of December 11, 1863, in the nature of an act of attainder—Article II, of constitution in force in 1863.*—The act of December 11, 1863 (Adj. Sess. Acts 1863, p. 645), ousting the board of curators of St. Charles College for having failed to take and subscribe the oath required by the act of March 23 (Sess. Acts 1863, p. 12), assumed, without judicial findings, that the board of curators had forfeited their position; it cut off any defenses which they might make upon a trial of their right to office, declared vacancies which had not been created, and proceeded to fill them. It was, therefore, in the nature of a bill of attainder, and equally unjust and odious, and unknown to our jurisprudence. Such judicial action was also expressly guarded against by article II of constitution, in force in 1863, which prohibited the union of the legislative and judicial power.—*Id.*
8. *Constitution—Act of Legislature declaring forfeiture—Legislative judgments.*—The recitals in a statute will in general be taken as correct. But an act declaring a forfeiture, if outside of legislative authority, can not be strengthened by reciting facts that might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment, but the question of forfeiture is strictly judicial. And the Legislature can not constitutionally know either that the facts exist or their legal effect.—*Id.*
9. *Corporations—Powers of amotion—Trial essential before amotion.*—The power of amotion is judicial in its character, and generally exercised by the courts of the land, though it may be given to the corporation by its charter, and, even if the charter is silent, an officer or corporator, in some classes of corporations, may be expelled for sufficient cause. But it is essential, in every case, that charges be made, a trial had, and that the accused be notified and have a full opportunity for defense.—*Id.*
10. *Act of March 23, 1863, created no vacancy in board of curators of St. Charles College.*—The act of March 23, 1863 (Sess. Acts 1863, p. 12), did not, *proprio vigore*, create any vacancy in the board of curators of St. Charles College, nor did it purport to do so.—*Id.*

ST. JOSEPH, CITY OF.

1. *Quo warranto—City council of St. Joseph—Title to office in, triable in Circuit Court—Construction of charter.*—In the absence of express words to that effect, the sixth section of article II of the charter of the city of St. Joseph did not make the judgment of the council board of that city final

ST. JOSEPH, CITY OF—(Continued.)

and conclusive as to the qualifications and elections of its members; and by virtue of section 1, chapter 157, Gen. Stat. 1865, the Circuit Court of Buchanan county had jurisdiction to determine the right of a councilman to office, on an information in the nature of a *quo warranto*.—State ex rel. Turner v. Fitzgerald, 425.

ST. LOUIS, CITY OF.

1. City of St. Louis, to use of Murphy, v. Clemens, 43 Mo. 395, affirmed.—City of St. Louis, to use of Murphy, v. Buckner, 19.
2. *Revenue—Sewers—Special tax bills—Mistake in name of owner does not vitiate—Construction of statute.*—An omission or mistake in the tax bill regarding the name of the true owner of property against which a tax is levied, under section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1867, pp. 75-6), does not vitiate the bill. The requirement of the statute making it the duty of the engineer to insert in the bill the name of the owner of the special lots assessed, is directory merely. But the rights of the owner can not be affected by such error until he has had his day in court.—City of St. Louis, to use of Rotchford, v. De Noue, 136.
3. *Revenue—Special tax bills, judgment on, how limited.*—In suits brought on special tax bills, under the provisions of section 16, art. VIII, of the revised charter of St. Louis (Sess. Acts 1867, pp. 75-6), judgment should be limited to the property and its owners. If not, it is erroneous; and a personal judgment against the parties to a deed of trust on certain real estate for taxes assessed against it is unwarranted, although such parties may have been properly joined in the suit, as having an interest in the property covered by the tax lien.—*Id.*
4. *Revenue—Street opening, tax assessments concerning—Constitutional construction of statute.*—It is the settled doctrine in this State that the special provisions of the act of March 24, 1868, amendatory of the St. Louis city charter (Adj. Sess. Acts 1868, p. 239), touching tax assessments for opening of streets, are not repugnant to the constitution. And the decisions in this State are in perfect harmony with the whole current of adjudications in other States.—Uhrig v. The City of St. Louis, 458.
5. *Revenue—Street opening—Tax of ten per cent. against the city of St. Louis, constitutional.*—The particular provisions of the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 239, § 3), limiting the assessments for street opening, against the city of St. Louis, on account of the general benefit to be derived therefrom, to ten per cent., are lawful. The levy of the assessment upon adjoining property-owners is an exercise of the taxing power; and the Legislature, in the exercise of this power, was at liberty, in its discretion, to impose the whole burden of the cost of the proposed improvements upon them. And so it might, in its discretion, limit or extend the district to be taxed, and thus increase or diminish the sum to be paid to any particular proprietor. The imposition of a portion of the tax, not exceeding a tenth, upon the city at large, is to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint.—*Id.*
6. *Revenue—Ordinance for opening Washington avenue valid, although condition therein might be null.*—The ordinance enacted under the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 238), providing for the widening of Washington avenue at the junction of Jefferson avenue, in the city of St. Louis

ST. LOUIS, CITY OF—(Continued.)

(ordinance 6,507), is valid, even though the condition thereto annexed—which provided that the ordinance should be null in case the Lindell Railway Company should not, within a limited time, indemnify the city, etc.—should be held invalid.—*Id.*

7. *Damages — Corporations — City of St. Louis — Hospital — Non-paying patient.*—The city of St. Louis is not liable in damages to a non-paying patient at the City Hospital for injuries resulting from the negligence and misfeasance of the officers and servants of the institution.—*Murtaugh v. The City of St. Louis*, 479.
8. *Damages — Corporations — Negligence — Charity cases.*—Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties. But where the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the consequence of such acts or omissions on the part of officers and servants.—*Id.*
9. *Practice, Civil — City of St. Louis — Contract — Suit for price — Tax bills.*—The city of St. Louis agreed with plaintiff to pay for certain work in tax bills. The work was done, but the tax bills proved to be invalid. *Held*, that plaintiff properly brought suit to recover the contract price for the work, without returning the void bills and demanding others; nor was he obliged to sue for failure to issue and deliver proper tax bills.—*Fisher v. The City of St. Louis*, 482.
10. *Corporations — Charter of St. Louis — Meat shops — City council.*—The city of St. Louis, under the charter of March 3, 1851, authorizing the city council to "establish markets and market places, and to regulate the vending of meat," (Sess. Acts 1851, p. 155,) had power to provide by ordinance that no person, not being the lessee of a butcher's stall, should sell or offer for sale in market, or in any other place, any fresh meat in less quantities than one quarter (*City of St. Louis v. Jackson*, 25 Mo. 37), and the tenth and thirty-first subdivisions of section 1, art. 4, of the revised charter of March 13, 1867 (Sess. Acts 1867, p. 63), did not have the effect of repealing that power.—*City of St. Louis v. Weber*, 547.
11. *Ordinances — Meat shops — Reasonableness of ordinance 5,832.*—Ordinance 5,832, in relation to markets in the city of St. Louis, excepting from the prohibition of meat shops that part of the city embraced in the new limits, and more than six squares from any market, was eminently just and reasonable.—*Id.*

SALES.

1. *Contracts — Sales — Custom merchant, how established; when binding — Evidence.*—A custom, to be good, must be general, uniform, and notorious, and, to be binding on the parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed; and evidence which does not tend to establish any open, uniform, and notorious rule, but simply consists of the declarations of witnesses as to what their individual opinions are, and the obligations they should have deemed

SALES—(Continued.)

resting upon them in certain circumstances, is illegal, and should be excluded.

—Southwestern Freight and Cotton Press Company v. Stanard, 71.

2. *Contracts—Established custom, evidence of, for what purpose admissible; force of.*—Where a contract is made as to a matter about which there is a well-established custom, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all the particulars which are not expressed in the contract. But evidence of custom is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law.—*Id.*
3. *Sales—Orders—Negotiable instruments.*—Where the vendor of goods delivered to the vendee an order on the vendor's mill, in words and figures following, viz: "Eagle Mills, deliver to Lamb & Quinlin 200 barrels Eagle Steam flour. St. Louis, October 1st, 1867. E. O. Stanard"—*held*, that the order was not negotiable, and that the vendees could not assign to other parties any greater or different right than such vendees possessed.—*Id.*
4. *Contracts—Sales—Statute of frauds—Right of property, what sufficient to pass.*—If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right does not attach to the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price.—*Id.*
5. *Contracts—Sales, presumed to be for cash unless the contrary is stipulated.*—When nothing is said between a vendor and vendee as to payment, and where no time is stipulated for payment, it is understood to be a cash sale, and payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment be not immediately made, the contract becomes void.—*Id.*
6. *Contracts—Sales—Constructive delivery—Right of possession—Vendor's lien—Non-payment—Insolvent buyer.*—Even if the title has passed and the goods have been constructively delivered, possession could not have been coerced till payment was made, if the vendor has not surrendered possession. While he retains it his lien exists, and, though there may be a delivery which will pass the title, it will not necessarily destroy the lien. Unless credit is expressly given, which is a waiver of any right to demand immediate payment, the lien will continue to exist. So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver even when credit has been given.—*Id.*
7. *Contracts—Sales—Delivery and acceptance, when a question for the jury.*—In doubtful cases the question of delivery and acceptance is for the jury, under instructions from the court. But where the facts are clear and undisputed, what will amount to a delivery and acceptance, or waiver or destruction of lien must be determined by the court.—*Id.*
8. *Contracts—Real estate, sale of—What acts an abandonment of.*—Where, after the sale of certain land, the vendor received back the possession of it, rented it out, enjoyed the rents and profits, exercised exclusive and absolute ownership over it, advertised it for sale, and had the title vested in himself, such acts will be held to be an abandonment by him of the sale.—*Kerr v. Bell*, 120.

SALES—(Continued.)

9. *Deed of trust—Resale.*—At a sale of real estate under a deed of trust, where the highest bidder fails to pay the purchase money, the property may be resold by the trustee; and, in the absence of any satisfactory proof that the beneficiaries officiously or unfairly intermeddled with the duties of the trustee, or did anything to prevent other persons from bidding at the sale, or took any unfair advantage for the purpose of getting the property at a price below its value, the claim of the grantor for relief must fail. (*Dover v. Kennerly et al.*, 38 Mo. 469, affirmed.) — *Dover v. Kennerly*, 145.
10. *Sale—Delivery—Reasonable time, how determined.*—What would be a "reasonable time," under the statute (Gen. Stat. 1865, p. 440, § 10), for delivery of goods after sale must be determined by the circumstances of each case. And instructions may properly call the attention of the jury to the evidence, and, upon a proper hypothesis, may direct what the verdict shall be. — *State, to use of Heed, v. King*, 233.
11. *Sale—Sheriff's return—Memorandum indorsed on—Inadequacy of price—Sale set aside, when.*—Where the sheriff's return upon an execution which had been levied upon certain shares of stock showed neither an advertisement nor public sale of the stock, and the only evidence of a sale at all was a mere memorandum or calculation of a sum of money made by some sale, indorsed on the back of the execution, and the price shown to be realized was greatly inadequate, the sale would be properly set aside on motion.—*Mechanics' Bank v. Pitt*, 364.
12. *Sale—Property may be reclaimed, when.*—A. sold a certain mare to B., with the express agreement that, until the whole of the purchase money was paid over, the title should remain in A. Before payment of the purchase money due, and without the knowledge of A., B. sold the mare. *Held*, that B. had no vested right in the mare, and could convey no title by sale; and A., being guilty of no laches, might reclaim the property from an innocent purchaser without notice.—*Little v. Page*, 412.

See CONTRACTS, 2. CONVEYANCES, 6. EXECUTIONS, 3, 4. EVIDENCE, 9, 10. MORTGAGES AND DEEDS OF TRUST, 9. TRUSTS, 5. UNITED STATES, 1.

SCHUYLER COUNTY RAILROAD.

See CORPORATIONS, 4, 5.

SEAL.

See EVIDENCE, 15.

SENATE, STATE.

See OFFICERS, 8.

SEWERS.

See REVENUE, 1, 2.

SHAREHOLDERS.

See BANKS AND BANKING, 1, 3. CORPORATIONS, 1, 9.

SHERIFF.

See OFFICERS, 9, 10. REVENUE, 3, 5.

SHERIFF'S SALES.

See EVIDENCE 9, 10. LAND AND LAND TITLES, 7, 8. SALES, 11.

SEIZURE.

See UNITED STATES, 1.

SPECIFIC PERFORMANCE.

See CONVEYANCES, 5.

STATE SAVINGS ASSOCIATION.

See CORPORATIONS, 6.

STATUTE, CONSTRUCTION OF.

1. *Clark county — Removal of county seat — Construction of Sess. Acts 1865, p. 312, and R. C. 1855, p. 514, ch. 45.*—It would seem to have been the obvious purpose of the Legislature, in the sixth section of the act to re-locate the county seat of Clark county (Sess. Acts 1865, p. 312), to adopt the machinery provided by the act of 1855 (R. C. 1855, p. 514, ch. 45), where that machinery was not superseded by the express provisions of the former act. The two acts taken together must be understood and construed as providing that the County Court of Clark county should act on the petition of a majority of the legal voters of that county, and appoint five commissioners to select a site for the public buildings "within two miles of said town of Cahoka," and to do whatever else the act of 1855 required of them, not at variance with the act of 1865; and that when the commissioners had made the selection, and discharged the duties devolved upon them in this behalf, the County Court should order the removal of the county seat to the selected locality.—*Spangler v. Clark County Court*, 207.
2. *Statute, construction of — Intention should be carried out.*—Generally, where words used in a statute are clear and unambiguous, there is no room left for construction; but when it is perceived that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and made to control the strict letter.—*State ex rel. Missouri Mutual Life Insurance Company v. King*, 283.
3. *Legislature — Exposition of laws by — What weight attached to.*—A legislative exposition in regard to the construction of statutes, though not controlling authority, is still entitled to weight.—*Pike v. Megoun*, 491.

See ADMINISTRATION, 6, 7. CONTRACTS, 2. CONVEYANCES, 12. CORPORATIONS, 4, 6. COURT, COUNTY, 1, 4. COURT, MACON COMMON PLEAS, 1. COURT, SUPREME, 3. CRIMES AND PUNISHMENTS, 2, 5, 8. DAMAGES, 1, 2. DOWER, 1. ELECTIONS, 4, 7, 8, 9, 10, 11. EVIDENCE, 11. EXECUTIONS, 1, 3. FRAUDULENT CONVEYANCES, 1. JUSTICES' COURTS, 1, 2, 3. OFFICERS, 1, 2, 3. PRACTICE, CIVIL, 3, 10, 12, 13, 15. PRACTICE, CIVIL—APPEAL, 3, 7. PRACTICE, CIVIL—PLEADING, 10, 21. PRACTICE, CRIMINAL, 1, 2, 5, 8. REVENUE, 1, 6, 7, 8, 9, 10, 11, 12, 13, 14. ST. CHARLES COLLEGE, 1, 6, 7, 8, 10. ST. JOSEPH, CITY OF, 1. TRADE-MARK, 2, 3.

STREETS.

1. *St. Charles, city of — Engineer — Street opening — Damages, assessment of — City not compelled to pay — Construction of statute.*—The charter of the city of St. Charles (Sess. Acts 1849, p. 272) in effect declared that property should not be used for opening or widening streets till damages assessed in favor of the property owners were paid, but did not provide for the rendition of any judgment, or point out any mode for the collection of damages.

STREETS—(Continued.)

Under that provision, the property of appellant was condemned for the opening of a street, and damages were assessed in his favor. On appeal to the Circuit Court from the finding of the jury, appellant obtained an award for a further amount against the city. *Held*, that the statute providing for the issuing of *mandamus* against corporations, requiring them to levy special taxes for the payment of judgments outstanding against them where an execution has been unavailing (Gen. Stat. 1865, ch. 161, §§ 77-79), has reference to a common-law judgment regularly rendered and mutually binding, and not to such an award.—*State ex rel. Rogers v. Hug*, 116.

2. *Corporations, city—Opening of streets—Assessment of damages—Payment, title of property before.*—After assessment of damages to property owners for opening of streets, the city may, at her option, on payment of costs, desist from the undertaking and leave parties *in statu quo*. Such assessment does not invest the city with the right of property, nor divest the title of the property-holder till payment of the amount assessed. (*City of St. Joseph v. Hamilton*, 43 Mo. 282, affirmed.)—*Id.*
3. *Revenue—Street opening, tax assessments concerning—Constitutional construction of statute.*—It is the settled doctrine in this State that the special provisions of the act of March 24, 1868, amendatory of the St. Louis city charter (Adj. Sess. Acts 1868, p. 239), touching tax assessments for opening of streets, are not repugnant to the constitution. And the decisions in this State are in perfect harmony with the whole current of adjudications in other States.—*Uhrig v. The City of St. Louis*, 458.
4. *Revenue—Street opening—Tax of ten per cent. against the city of St. Louis, constitutional.*—The particular provisions of the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 239, § 3), limiting the assessments for street opening, against the city of St. Louis, on account of the general benefit to be derived therefrom, to ten per cent., are lawful. The levy of the assessment upon adjoining property-owners is an exercise of the taxing power; and the Legislature, in the exercise of this power, was at liberty, in its discretion, to impose the whole burden of the cost of the proposed improvements upon them. And so it might, in its discretion, limit or extend the district to be taxed, and thus increase or diminish the sum to be paid to any particular proprietor. The imposition of a portion of the tax, not exceeding a tenth, upon the city at large, is to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint.—*Id.*
5. *Revenue—Ordinance for opening Washington avenue valid, although condition therein might be null.*—The ordinance enacted under the act of March 24, 1868 (Adj. Sess. Acts 1868, p. 238), providing for the widening of Washington avenue at the junction of Jefferson avenue, in the city of St. Louis (ordinance 6,507), is valid, even though the condition thereto annexed—which provided that the ordinance should be null in case the Lindell Railway Company should not, within a limited time, indemnify the city, etc.—should be held invalid.—*Id.*

SURETIES.

1. *Administrators—Joint bonds of—Liability of sureties on for acts of survivor.*—A. and B. were appointed administrators of a certain estate, and gave bond as such. Subsequently an act of the Legislature, mentioning them by name and style of office, empowered them to sell the estate and put the pur-

SURETIES—(*Continued.*)

chase money out at interest for the benefit of the heirs. It also required them to give new bond, with securities, to insure the performance of the trusts vested by the act. The additional bond was given, and afterward, A. having become disqualified, B., by a further act of the Legislature, was clothed with full powers to carry out the trusts, but no new bond was required. B. proceeded to sell the estate, but failed to account for the proceeds, and suit was brought against the securities on the bond called for by the original act. *Held*, that the word "administrator," as used therein, simply designated their persons; and that the powers conferred by the act were given to them *nomi-natim*, as individuals, and not in any representative capacity. They were donees of a naked power, unconnected with their duties as administrators, and the securities on their bond could not be held responsible for the wrongful acts of B.—*State, to use of Watts v. Boon, 254.*

2. *Sureties for several persons presumed to be joint—Not liable for acts of survivor.*—If a person engage as a surety to several individuals, the engagement must be understood to be to all of them collectively and jointly; and if any of them die or cease to act, it will not be available in respect to transactions afterward by the survivors or the persons continuing to act.—*Id.*
3. *Sureties—Release of, at law and in equity.*—At law, a technical release of one surety is a release of all; but the rule is otherwise in equity.—*State ex rel. Midgett v. Matson, 305.*
4. *Principal and surety—Co-sureties—Discharge of one no discharge of the others in equity.*—A release of the principal will always discharge the surety; but one surety may be discharged without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. The discharge of one surety can not be permitted to increase the liability of the others.—*Id.*
5. *Equity—Co-sureties—Contribution—Judgment liens—Subrogation.*—Judgment was recovered against a number of co-sureties, who, subsequently thereto, sold sundry lands owned by them respectively while the same were subject to the lien of the judgment. The purchaser of one parcel, to prevent its sale under the judgment, paid the amount due thereon, and afterward brought suit in equity, praying that the land disposed of by the co-sureties, while subject to the same lien, might be subjected to a ratable proportion of the debt paid by him. *Held*, that while at law plaintiff's payment of the amount of the judgment operated as an extinguishment of the lien, yet equity, in furtherance of justice, would subrogate plaintiff to the rights of his grantor, and charge the lands bound by the lien in the hands of the other sureties or their grantees who purchased with notice. And the payment of the debt by plaintiff operated in equity as an immediate assignment to him of all the securities held by the judgment creditor. In such case it was the duty of the latter to make the transfer *instantaneus*.—*Furnold v. The Bank of the State of Missouri, 336.*

See CONTRACTS, 1.

T

TAXES.

See REVENUE.

TAX BILLS.

See REVENUE, 1, 2. STREETS, 1, 2.

TENDER.

See JUSTICES' COURTS, 3.

TITLE TO PERSONAL PROPERTY.

See AGENCY, 6, 7.

TOWNSHIPS.

See CONTRACTS, 20

TRADE-MARK.

1. *Trade-marks — Infringement on, knowledge of by maker — Injunction.*— In a suit to enjoin defendant from selling "Charter Oak" stoves, bearing a certain trade-mark, the fact that parties in other localities manufactured "Charter Oak" stoves, and sent them into market to compete with plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights.— *Filley v. Fassett*, 168.
2. *Trade-mark, statute concerning — Claim filed under — Effect on existing rights.*— The statute concerning trade-marks (Gen. Stat. 1865, p. 912) was not designed to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired by appropriation and use.— *Id.*
3. *Trade-mark, statute concerning — Claim under, not available for manufacturers without the State.*— A written claim to a disputed trade-mark, filed in the office of recorder of deeds in the county of St. Louis, under the act of March, 1866 (Gen. Stat. 1865, p. 912), can not avail the manufacturer of stoves in another State.— *Id.*
4. *Trade-marks of the goods must point out their true source and origin.*— Any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark, which is adapted to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. But the mark must point out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves; and the fact that the name of a trade-mark, with the combined device, are neither descriptions nor suggestive of the style, character, or qualities of the article manufactured, is one of their virtues as a trade-mark.— *Id.*
5. *Trade-mark pointing out the source and origin of goods, a property acquired.*— By the adoption and use of a name and device adapted to point out the true source and origin of the manufactured article, the manufacturer acquires a property interest therein which the courts will protect.— *Id.*
6. *Trade-mark — Name separated from surrounding device — Use of by other parties an infringement.*— As "Charter Oak" stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself, the use of the name "Charter Oak," separated from the other parts of the trade-mark, amounted to an infringement of the maker's rights.— *Id.*
7. *Trade-mark — Imitation need not be exact or perfect — Deception and fraud need not be proved — Injunction to stop piracy of, when.*— The imitation of the original trade-mark need not be exact or perfect. It may be limited

TRADE-MARK—(Continued.)

and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the goods. Nor is it necessary to prove intentional fraud. If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction.—*Id.*

TREASURY NOTES, U. S.

See **CRIMES AND PUNISHMENTS**, 1, 3, 4, 6.

TROVER.

1. *Practice, Civil—Actions—Trove*—*Refusal to deliver without lawful reason—Conversion.*—Although a refusal to deliver property on demand does not constitute a technical conversion, it is *prima facie* evidence of it, and will be conclusive in the absence of all evidence to explain and justify the refusal. And where the refusal is qualified by certain conditions, but there is nothing to show that the qualification rests upon a legal basis, the refusal is nevertheless conversion.—*Huxley v. Hartzell*, 370.

TRUSTS.

1. *Equity—Conveyances, fraudulent—Secret trusts.*—The law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands.—*Waddingham's Ex. v. Loker*, 132.
2. *Equity—Voluntary trusts—Creditors—Agency.*—In a suit to subject certain stocks held by the widow and children of A. to the payment of his obligations, the mere fact that at his solicitation B. had purchased and held the same for the benefit of A.'s family, and that, as agent for B., A. had examined the books of the company and looked after the general management of the stocks, and, in his capacity as agent, had deposited dividends arising from the stocks, will not make such stocks liable for his debts, if it further appears that the stocks were not procured with his money or credit, and that he had no ownership or control of it except as agent of B.—*Id.*
3. *Equity—Agent—Purchase of property of principal by, forbidden.*—An agent can not be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation.—*Grunley v. Webb*, 444.
4. *Equity—Agent, while in fiduciary capacity, can not interfere with title to the trust property.*—An agent who, for a certain remuneration, undertook to collect the rents and exercise control over the property of his principal while the latter was absent and relied entirely on his discretion, judgment, and integrity, had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. By pur-

TRUSTS—(Continued.)

- chasing the property under such circumstances, he made himself liable as a trustee in relation thereto, for the benefit of his principal.—*Id.*
5. *Equity—Sale—Purchaser—False representations by—Constructive trusts.*—Where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain—as, by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtained it at a sacrifice—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (*McNew v. Booth*, 42 Mo. 189.)—*Id.*
6. *Equity—Leasehold estate—Trustee—Renewal of lease in name of—Profits, to whom accounted for.*—Where a trustee in charge of a leasehold estate obtained a renewal of the lease of his *cestui que trust* in his own name, before the lease had expired, and the possession and title which he had got by reason of his being agent or trustee superinduced the execution of the lease to him, he will be obliged to assign it to the *cestui que trust*, and account for the profits.—*Id.*
7. *Equity—Lease—Renewal of by trustee in his own name—New lease held in trust for person entitled to original lease.*—A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon a refusal of the lessor to grant a new lease to the *cestui que trust*, will be held in trust for the person entitled to the old lease, on the ground of public policy, in order to prevent persons in such situations from acting so as to take a benefit for themselves.—*Id.*
8. *Evidence—Receipt—General and particular terms, how construed.*—A receipt given in full satisfaction of a certain judgment therein specified, and also of "all claims and demands," will not avail against another suit pending between the same parties, and not shown to have been intended by them to be included in the receipt. Language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.—*Id.*

See CONTRACTS, 5. MORTGAGES AND DEEDS OF TRUST.

U

UNITED STATES.

1. *Sale—Seizure of mare by government—Condemnation and sale of by—War power.*—Suit was brought for the possession of a mare. The proof showed that she was taken by direct authority of the government of the United States, to meet a pressing exigency; that she was used in the military service, and then condemned and sold under the order of the department commander, with a direct and unequivocal assertion of title in the United States. Defendant became the purchaser, and suit was brought for her recovery by the original owner. *Held*, that plaintiff was not entitled to recover. Under the exigencies of the case, the government could seize and condemn the property, and impart good title by sale. If the claim were valid it should be brought against the United States.—*Wellman v. Wickerman*, 484.

USURY.

1. *Contracts—Equity—Deed of trust, reformation of—Usury.*—In an action by the grantee to reform a deed of trust given to secure the payment of a note, where the defense of usury is set up and established in evidence, plaintiff must produce his note and rebate the usurious portion thereof before he can obtain the redress sought. Defendant will not be compelled to resort to an action enjoining the sale of the property under the deed in order to maintain his rights.—*Corby v. Bean*, 379.

V

VERDICT.

See PRACTICE, CIVIL, 5. PRACTICE, CIVIL—TRIALS, 15.

VOUCHERS, U. S.

See AGENCY, 1.

W

WAR POWER.

See UNITED STATES, 1.

WILLS.

1. *Wills—Guardian and ward—Will to guardian by ward—Presumptions of law concerning.*—In a suit to set aside a will, it appeared that the donee became the guardian of deceased while the latter was a mere child; that deceased always resided in his family; that he surrendered everything to his guardian's judgment, and reposed the most implicit confidence in him in every respect; that a day or two after becoming of age, and while residing in the house of his guardian, deceased effected a settlement with him, and on the day following made his will, disinheriting all his kindred and relations, and conveying all his property to the guardian; that about a month afterward, and while still under his care, he died: *held*, that the will was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it.—*Garvin's Adm'r v. Williams*, 465.

WITNESSES.

See ADMINISTRATION, 4, 6.

